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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Whether the due process clause of the Fourteenth Amendment places on school districts or its administrators a constitutional duty to protect students from criminal assaults by a teacher, where the district has no knowledge of the criminal activity or the fact that any particular individual is at risk.

B. Whether any such duty was clearly established as a matter of law in 1979 when the Petitioners acted in this case.

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IV. OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit is reported at 1988 U.S.App. Lexis 12303, and is printed in the Appendix hereto, page 1. The Opinion and Order of the United States District Court for the Western District of Pennsylvania is reported at 667 F.Supp. 1088 (1987) and U.S. Dist. LEXIS 7950, and is printed in the Appendix hereto, page 39.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254.

The Opinion and Order of the United States Court of Appeals for the Third Circuit was entered on September 12, 1988. App., page 1. A timely Petition for Rehearing was denied on October 5, 1988. App., p. 33. On October 14, 1988, the United States Court of Appeals for the Third Circuit issued an Order staying the issuance of the mandate in the instant appeal pending this petition to the Supreme Court of the United States for Writ of Certiorari. App., page 35.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. §1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell vs Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. §1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. §1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983

C. State Statutes

24 Pa.C.S.A. §13-1317 is set forth in the Appendix, page 119.

24 Pa.C.S.A. §13-1327(a) is set forth in the Appendix, page 123.

VII. STATEMENT OF CASE

This is an appeal of an Order of the United States Court of Appeals for the Third Circuit, Case No. 87-3637, affirming the Order of the United States District Court for the Western District of Pennsylvania, Case No. 87-63E, which denied the Motion of Petitioners Frederick Smith, Richard Miller and Frederick Shuey for Summary Judgment that they are immune from suit on the allegations of this case. Opinion and Order, App., p. 24. This action commenced with the filing of a Complaint by Plaintiff-Respondent, Kathleen Stoneking ("Respondent" or "Stoneking"), in the United States District Court for the Western District of Pennsylvania, Erie Division, on March 24, 1987. Complaint, App., p. 85.

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner, Frederick Smith ("Smith"), was the principal of the Bradford Area High School; Petitioner Richard Miller ("Miller"), was the assistant principal; and Petitioner Frederick Shuey ("Shuey"), was the superintendent of the School District.

Respondent Kathleen Stoneking ("Stoneking") attended and graduated from the Bradford Area High School in 1983.

Since the question of whether officials are immune from trial is based upon a strictly objective test, *Harlow vs Fitzgerald*, 457 U.S. 800 (1982), the salient facts can be drawn entirely from the pleadings.[1]

Respondent contends in her Complaint that the Petitioners received information in 1979 that the former band director of the Bradford Area High School, Edward Wright, had attempted to sexually molest a female band member. Complaint, par. 11, App., p. 89. Respondent also alleges that Petitioners began maintaining a file on Wright and that they instructed him not to place himself in one-on-one situations with female students. Complaint, pars. 13, 14 and 15, App., pp. 89-90. She alleges that, subsequent to the alleged molestation of the other band member in 1979, Wright began to sexually abuse and/or molest her, both on and off of school property. Complaint, paragraphs 23 and 24, App., pp. 91-92. Wright's misconduct was exposed in March of 1986. His written resignation was received and accepted by the School District on March 14, 1986, effective immediately. Complaint, paragraph 26, App., p. 92. Wright subsequently pleaded guilty to numerous criminal charges.

On August 7, 1987, Petitioners filed a Motion for Summary Judgment, contending that:

1.) Respondent's claims prior to March 24,

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[1]*Cf. Mitchell vs Forsyth*, 472 U.S. 511, (1985), in which the Court holds that, in a proper case, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 517.

1985 were barred by the applicable statute of limitations;

2.) The School District had no constitutional duty to protect her for any incidents after the date she graduated from school;

3.) Respondent alleged no actionable violation of her civil rights; and

4.) Petitioners Smith, Miller, and Shuey were shielded from liability by the defense of qualified immunity.

Respondent filed a Brief in Opposition.

The District Court issued its Opinion and Order on August 28, 1987. The District Court held, *inter alia*, that there were genuine issues of material fact pertaining to the statute of limitations; that Respondent had alleged a violation of a right protected by the substantive component of the due process clause; and that Petitioners Smith, Miller, and Shuey were not shielded from liability by the defense of qualified immunity.

On September 22, 1987, upon a motion by Petitioners, the District Court amended its Order to indicate that its decision on the statute of limitations involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [August 28] Order may materially advance the ultimate termination of the litigation."

On September 25, 1987, Petitioners filed a Petition

for Permission to Appeal that portion of the District Court's Order as it related to the application of the statute of limitations to this case. On October 21, 1987, the United States Court of Appeals for the Third Circuit denied the petition. App., p. 81.

Petitioners filed their Notice of Appeal on September 24, 1987, from the District Court's Order as it relates to the issue of qualified immunity.[2]

The United States Court of Appeals for the Third Circuit issued its opinion and order denying Petitioners appeal on September 12, 1988. Opinion and Order, App., p. 24. The majority of the divided panel held that Petitioners were not entitled to the defense of qualified immunity, stating that clearly established law existed in 1979, establishing a special relationship between public school administrators and students, which gave rise to a duty to protect Respondent from harm by a third party, Wright. App., pp. 21-23.

The honorable Judge Stapleton, in his dissenting opinion, would have held the opposite. He correctly stated that "neither [the United states Court of Appeals for the Third Circuit] nor any other federal court of appeals has held . . . that a special relationship exists between a school administrator and students within his or her jurisdiction." Opinion, App., p. 26. Judge Stapleton further noted that

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[2]A denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291. *Mitchell vs Forsyth, supra.*, 472 U.S. 511.

the majority opinion and judgment marked an expansion of prior law which Petitioners could not have been expected to know. Opinion, App., pp. 28-29.

A timely Petition for Rehearing was denied on October 5, 1988. The Court on October 14, 1988 issued an Order staying the issuance of the mandate in the instant appeal pending this petition to the Supreme Court of the United States for Writ of Certiorari. App., p. 35.

VIII. ARGUMENT

A. Summary of argument

The Third Circuit's holding in this case marks a vast and unwarranted expansion of civil liability under § 1983. The Court, in its ruling, goes far beyond previous law, contradicting not only its own prior rulings but those of this and other Courts as well.

It must be remembered that the Court below was faced only with the narrow issue of whether these school officials were entitled to qualified immunity for actions they took (or allegedly failed to take) in 1979. As discussed in more detail below, governmental officials can be found liable only when they knew or should have known that their conduct violated some "clearly established" constitutional rights of the plaintiff.[3]

Before the Court could determine whether the alleged right was "clearly established," however, it first had to determine whether such a right exists at all. The Court below found for the first time that a school district does have an affirmative duty, arising out of the Fourteenth Amendment, to protect high school students from sexual abuse by teachers. The Court then found that this newly-created duty was "clearly established" in 1979 when these officials acted.

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[3]*See* discussion at pp. 20-27, *infra*.

This holding, however, must be carefully scrutinized in light of the fact that the majority relied heavily upon its prior opinion in the case of *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985). That opinion is directly contrary to a decision on identical facts by the Seventh Circuit, a decision now under review by this Court. *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988). Moreover, the Third Circuit's finding of potential liability in this case seems to be directly contrary to this Court's own rationale in *Martinez vs California*, 444 U.S. 277 (1980).

Petitioners thus contend that the Circuit Court erred in (a) finding that such a constitutional duty exists in the first instance, and (b) further erred in holding that such a duty was "clearly established" at the time Respondents acted. These errors are so egregious that this Court ought to grant certiorari and examine for itself the far-reaching implications of the holding of the Court below.

The finding of the Court below that a duty exists, guaranteed by the due process clause, to protect persons at liberty from harm, is an essential part of its more narrow ruling on the sole issue before it (that of qualified immunity). The broad implications of this ruling thus require review by this Court.

Since the Third Circuit began its analysis by examining the nature of the alleged constitutional right, we shall begin our analysis there as well.

B. Public school officials have no constitutional duty to protect students from criminal acts by teachers

It must be noted at the outset that Stoneking is not claiming that Smith, Miller and Shuey actually abused her or touched her in any way. Stoneking asserts only that she has a right to be free from sexual molestation, and that Smith, Miller and Shuey had a duty to protect her from this alleged molestation.[4]

The issue of whether governmental officials have a constitutional duty to protect individuals at liberty from criminal acts of third persons is presently before this Court. In *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988), *pending at* No. 87-154,[5] this Honorable Court has been asked to determine whether a child enjoys a constitutionally-protected right under the Fourteenth Amendment to protection from abusive parents.

The question of the state's duty to protect individuals at liberty from criminal acts of third persons has been a subject of controversy in the Courts of Appeals since

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[4]The gravamen of Stoneking's Complaint is that she had a right to be free from sexual assault by a teacher of the Bradford Area School District. Of course, for every right there exists a correlative duty; thus, Stoneking alleges in essence that the District and Smith, Miller and Shuey had a duty to prevent the alleged assaults against her by Wright.

[5]Argument was conducted before this Court in *DeShaney* on November 2, 1988.

this Court's decision in *Martinez vs California*, 444 U.S. 277 (1980). In *Martinez*, a mentally disturbed sex offender was paroled after five years of a one to twenty year term. It was conceded that the parolee was a known risk when he was released. Subsequent to his release he killed a fifteen year old girl. An action was brought under § 1983 to recover for the loss sustained as a result of the girl's murder. This Court held that the actions of the parolee were too remote to be considered a proximate cause of the parole board's actions in releasing the parolee, and therefore denied plaintiff's cause of action under § 1983. This Court left open, however, the possibility that liability may be found in future cases. *Id.*, 444 U.S. at 285.

Since *Martinez*, the Courts of Appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials. Some Courts have imposed such a duty when they find that a "special relationship" exists between the state and the individual seeking protection.

For example, in *Jensen vs Conrad*, 747 F.2d 185, (4th Cir. 1984), *cert. denied* 470 U.S. 1052 (1984) the estates of six children who died as the result of brutal beatings inflicted by their guardians sued the children's services agencies which had handled their cases. In each case the child involved had been the subject of an investigation by social workers charged under state law with the obligation to investigate cases of child abuse and take steps necessary to prevent similar abuse from occurring. Causes of action were alleged under § 1983 based upon a purported viola-

tion of the children's Fourteenth Amendment rights resulting from the failure of the social service agencies and employees to intervene and provide the protection necessary to prevent the harm which occurred.

The United State Court of Appeals for the Fourth Circuit reviewed the case law which had developed nationwide on the issue of an affirmative duty arising out of a special relationship to provide protection against deprivation of constitutional rights. The Court identified three factors which it concluded had been persuasive in finding special relationships in the cases reviewed. These include (1) whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; (2) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (3) whether the state knew of the victim's particular plight. *Id.*, 747 F.2d at 194-195, n. 11.

Some courts have declined to follow the "special relationship" test, analyzing such cases instead strictly in terms of causation, as this Court did in *Martinez*. For example, the Seventh Circuit has eschewed the notion of a "special relationship" outside of pure custodial relationships such as a prison setting. In *DeShaney, supra* the Seventh Circuit held that a county children's services agency was not liable for serious injuries suffered by a child at the hands of his abusive father even though the agency had received a prior allegation that the child was being abused. That Court held that, while the actions of the county arguably did not help the abused child, they

certainly did not harm him or cause his injuries to be more likely to occur, and therefore as a matter of law the county was not liable.[6]

The United States Court of Appeals for the Third Circuit, contrary to the Seventh Circuit, has fully embraced the "special relationship" test outlined by the Fourth Circuit in *Jensen*. In *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985), discussing *Jensen*, a divided panel of the Third Circuit suggested that it would be appropriate to find a "special relationship" if the Jensen three-prong test was met. *Estate of Bailey*, 768 F.2d at 509.[7] The Court went on to hold that a county children's services agency could be held accountable under § 1983 for injuries sustained by a minor child at the hand of an

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[6]The Seventh Circuit found that the agency was not liable to the plaintiff, because it was not the cause of the harm. The Court stated

> It is unlikely that [the social worker's] well intentioned but ineffectual intervention did [the infant victim] any good at all, but it is unlikely that she did him any harm. She merely failed to protect him from his bestial father.

DeShaney, Id., p.302. The Court in *DeShaney* refused to adopt the special relationship doctrine as set forth in the Third Circuit's decision of *Estate of Bailey, supra.*

[7]The United States Court of Appeals for the Third Circuit recently reaffirmed its approval of the *Jensen* three-step analysis. In *Commonwealth Bank and Trust Co. vs Russell*, 825 F.2d 12 (3rd Cir. 1987), the Third Circuit applied the *Jensen* test without expressly saying so. On page 16 of its decision, the Third Circuit distinguishes *Commonwealth Bank* from *Estate of Bailey, supra*, on the basis that *Commonwealth Bank* case flunks the third prong of the three *Jensen* tests (i.e., whether the state knew of any particular threat to plaintiff's decedents).

abusive parent.

The opinion of the Third Circuit in this case extends the boundaries of this "special relationship" concept even farther. As discussed in more detail at pp. 16-18 below, the Court below has virtually abolished one of the prongs of the three-part test announced in *Jensen, supra.*

It should be pointed out that the operative facts of *Estate of Bailey* are identical to those of *DeShaney.* Should this Court affirm the Seventh Circuit in *DeShaney,* it will almost of necessity overrule the Third Circuit's holding in *Estate of Bailey.* Since both the District Court and the Third Circuit relied heavily on *Estate of Bailey* in their holdings in this case, an affirmance in *DeShaney* will almost certainly necessitate a reversal in this case.

C. The Third Circuit opinion expands liability under § 1983 by abolishing one prong of the prior "special relationship" test.

By finding a "special relationship" in this case, the Third Circuit further expanded liability under § 1983. No other Circuit Court has found that a special relationship can exist unless the public body has prior knowledge of the identity of the victim and the victim's particular plight. This requirement is taken directly from this Court's hold-

ing in *Martinez, supra.*[8]

In its Opinion, the Third Circuit moved well beyond that requirement by finding that public school officials have a constitutional duty to protect students from criminal acts by teachers, even when there is no notice that a particular, identified student is in peril. Opinion, App., p. 17.[9]

It is uncontroverted that Petitioners had no knowledge of Stoneking's particular plight. However, the Third Circuit Opinion would ignore this well accepted requirement, and would deny immunity to defendants. The Third Circuit, in fact, found that the school officials were on notice that "female band members faced a 'special danger'" from Wright. Opinion, App., p. 21. Thus, instead of accepting as a threshold requirement that public school officials must have particular knowledge of an identifiable student and that student's particular plight, the Third Circuit would establish a duty to protect a broad class of unidentified persons. Petitioners submit that this holding of the Third Circuit is a significant and unwarranted

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[8]In *Martinez*, this Court held that the § 1983 claimants failed to state a cause of action against the California parole board, because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Martinez, supra.*, 444 U.S. 277 at 286.

[9]Judge Stapleton correctly noted in his dissenting Opinion that "[a] school teacher, school administrator, or anyone else acting under the color of state law clearly violates the constitution if he or she sexually abuses a student. That principle is not helpful here, however, because this suit does not involve a claim against Wright." Opinion, App., p. 25.

expansion of liability under 42 U.S.C. § 1983.

More significantly, however, this holding conflicts with this Court's holding in *Martinez, supra.*. Respondent, who was not in any sense of the word in the "custody" of the school district at the time of the alleged assault, falls within the category of "public at large" to whom no special duty is owed under the holding of *Martinez*. 444 U.S. at 286. This is because the state did not select her out of the public at large and place her at risk. *See Fox vs Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers vs DeVito*, 686 F.2d 616 (7th Cir. 1982).

D. A duty to protect ought to be imposed only in the setting of a custodial relationship

This Court and the Circuit Courts have imposed an affirmative duty upon government officials to protect individuals only in very limited circumstances. Generally, an affirmative duty to protect individuals will be imposed only where the state has selected a person from the public at large and placed him in a position of peril. *See, e.g., Estelle vs Gamble*, 429 U.S. 97 (1976), (state officials are under a duty to provide medical care to those held in custody of prison officials); *Youngberg vs Romeo*, 457 U.S. 307 (1982) (caretakers of individuals committed to a mental institution have an affirmative duty to provide that level of care and training necessary to protect the safety of the mentally retarded individual); *cf. White vs Rochford*,

592 F.2d 381 (7th Cir. 1979) (where police officers abandoned minors in car on highway after making a traffic arrest of the adult driver, state placed the minors at peril and was subject to liability under § 1983). This is appropriate since, in those situations, the person in custody is dependent upon the state for his physical well-being. In no instance, however, has this Court or any other Circuit Court imposed a duty upon school districts and its officials to protect students, who are at liberty.

In the instant case, however, there can be no special relationship, as Stoneking was not in the "custody" of school officials at the times of the alleged assaults.[10] The Third Circuit noted that Pennsylvania's mandatory attendance law, 24 Pa.C.S.A. § 13-1327 (a), does not provide public school administrators with legal custody of their students. Opinion, App., p. 18. Further, the *in loco*

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[10]This Court has recognized this in *Ingraham vs Wright, supra.*, 430 U.S. 651, where it noted:

> [T]he public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id., 430 U.S. at 670.

parentis doctrine, adopted by the Commonwealth of Pennsylvania and codified at 24 Pa.C.S.A. § 13-1317, establishes only limited rights of administrators over students, but does not establish any affirmative duties owed to students by administrators.

E. Petitioners are entitled to qualified immunity

The holding of the Third Circuit in the case at bar is particularly egregious in that, after finding for the first time that this affirmative constitutional duty to protect students exists, it then declares that the Petitioners are not immune from suit. This it can only do if the constitutional rights which were purportedly violated were "clearly established" at the time Petitioners acted. It is respectfully submitted that constitutional rights which are declared for the first time in 1988 were not clearly established in 1979.[11]

This Court established the current standards governing qualified immunity in *Harlow vs Fitzgerald*, 457 U.S.

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[11]The relevant date of the inquiry is 1979, since this is the first alleged notice to the school district of any problem with Wright. Complaint, Pars. 11, 13, App., p. 89. Stoneking herself was a member of the band in 1979. Although the alleged conduct of Wright extended beyond Stoneking's graduation in 1983, Complaint, Pars. 22, 24, 25, App., pp. 91-92, there are no allegations of further notices of any improper contacts between Wright and any student until well after Stoneking's graduation.

800 (1982).[12] In *Harlow*, this Court stated:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. As this Court determined in *Davis vs Sherer*, 468 U.S. 183 (1984), no other inquiry is relevant.

From the foregoing formulation, the following analysis must be undertaken to determine whether a claim of qualified immunity is properly taken:

1. Is the claim asserted by governmental officials performing discretionary functions?

2. Does Plaintiff have a clearly established statutory or constitutional right which is threatened by the aforementioned exercise of discretion?

3. Should a reasonable person expect that his conduct in exercise of his discretion would violate that right?

The first step of the analysis outlined above cannot be seriously disputed. Public school officials are certainly

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[12] *Harlow* was a suit against federal, not state, officials, but as this Court stated in deciding the case, it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 818, n.30 (quoting *Butz vs Economou*, 438 U.S. 478, 504 (1978).

governmental officials, and the actions taken by them with respect to investigation of allegations of teacher misconduct, as well as their responses to the results of that investigation, are highly discretionary in nature. Thus, Smith, Miller and Shuey are entitled to assert the defense.

The second prong of this three part analysis is not met. In the instant case, neither the district nor Petitioners owed Stoneking any constitutional duty to protect her from assaults by Wright. *See* pp. 12-16, above. This means immunity is properly invoked.

Finally, even if the Court could find that such a constitutional duty exists, these officials are still immune since they satisfy the requirements of the the third prong; that is, they could not reasonably be expected in 1979 to have known that a contitutional right to protection would be announced in 1988.

In *Harlow vs Fitzgerald, supra*, this Court expressly declined to set forth the criteria for determining whether a right (and, Petitioners submit, a corresponding duty) is "clearly established". 457 U.S. at 118, n.32. However, the Third Circuit, in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), adopted an approach that requires officials to apply general, well-developed legal principles. 747 F.2d at 144. This approach requires some -- but not precise -- factual correspondence between applicable legal precedents and the case at issue. *Id.* at 145. Officials are therefore required to relate established legal principles set forth in previous cases to analogous factual situations. *Id.* at 144,

citing *Williams vs Bennett*, 689 F.2d 1370, 1381-82 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). It does not, however, require lay public officials to "predic[t] the future course of constitutional law." *People of Three Mile Island*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967).

The question becomes, then, one of identifying legal principles governing analogous factual situations at the time the alleged violation occurred, and, if any existed, whether the official should have related this established law to the situation before them. *Hicks vs Feeney*, 770 F.2d 375, 380 (3rd Cir. 1985). Hence, a review of the law as it existed in 1979 must be undertaken.[13]

The Third Circuit relied on a number of cases in determining whether or not clearly established law imposed a constitutional duty upon Petitioners to protect Stoneking. Opinion and Order, App., pp. 15-17. As noted by Judge Stapleton in his dissent, however, no law existed in 1979 from which a "constitutional duty to investigate" is readily apparent. Opinion, App., p. 25.

Indeed, the cases upon which the Third Circuit and the trial court primarily relied involved procedural due process claims under which high school students were entitled to freedom from arbitrary punishment and disciplinary procedures, or cases involving alleged abuse of dependent persons in state institutions. See *Ingraham vs*

---

[13]*See* note 11, *supra*.

Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (corporal punishment of public schools implicates a constitutionally protected liberty interest); *Milonas vs Williams*, 692 F.2d 931, 942-43 (10th Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983) (due process rights of children in quasi-juvenile detention facility violated by certain physically abusive disciplinary practices); *Hall vs Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (liberty interest recognized rendering unlawful arbitrary corporal punishment of school student); *Youngberg vs Romeo*, 457 U.S. 307, 315-16 (1982) (constitutionally protected liberty interest found for persons confined in mental institution); *Spence vs Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (constitutional right of persons confined in mental hospital to be free from assault by other patients). None of these cases clearly establish a duty for high school administrators to protect unknown students from criminal activity by a teacher.

The other cases cited by the Third Circuit are equally inapplicable to the proposition that the law was "clearly established" in 1979 that school district administrators had a constitutional duty to investigate whether or not a school teacher was sexually abusing a student. In *Doe vs New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981) and *Doe vs New York City Department of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert. denied* 464 U.S. 864 (1983) there is no discussion involving a substantive constitutional right. And, *P.L.C. vs Housing Authority of the County of Warren*, 588 F.Supp. 961 (W.D. Pa. 1984), along with the previous cited authority, was decided subse-

quent to 1979.

Indeed, the instant case is a far cry from situations involving a clearly established and well litigated general proposition in which the case at hand merely presents the new factual wrinkle. Petitioners in 1979 had not previously encountered, nor were they aware of any cases, involving situations remotely parallel to the incidents which are the subject of this lawsuit. Whether there existed any constitutional requirement to protect female students from sexual abuse was an open question at all times relevant hereto.

As Justice Stapleton noted in his dissent,

> Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.
>
> The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students within the district is clearly distinguishable from that between a social worker and her five-year

> old ward or that between a jailer and his incarcerated charge.

Id., App., pp. 26-27.

The holding of the Third Circuit in the instant case has required the public school administrators to "predict the future course of constitutional law", contrary to its own holding in *People of Three Mile Island, supra*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967). Indeed, had these public school administrators in this case been able to "predict the future course of constitutional law," they would have concluded that there was in fact *no* constitutional duty to protect students from sexual abuse by teachers.

Before the Third Circuit decided the instant appeal, the Pennsylvania Commonwealth Court ruled squarely that no such duty exists. In *Scott vs Willis*, ___ Pa.Commw. ___, 543 A.2d 165 (1988), two students who had been sexually assaulted by a teacher on school property brought suit against the school district and its officials, alleging a violation of their constitutional rights and seeking relief under § 1983. The Pennsylvania Commonwealth Court sustained a demurrer to the § 1983 claim, holding expressly that there was no special relationship between the school district and the plaintiffs, and that therefore there was no constitutional duty to protect those students.

It should be noted that the relationship between a Pennsylvania public school and its students is created under state law, and that school administrators are bound

by state laws and state courts just as much as by federal laws and federal courts. How can it be said that there is clearly established law that a special relationship exists between public school administrators and their students, when the state courts, on identical facts, have found that no such relationship or duty exists?

Scott vs Willis is indistinguishable from, and irreconcilable with, the decision of the Third Circuit and the trial court. These lay public school administrators should not be put in a position of having to decide whether the state court decision or the federal court decision is correct.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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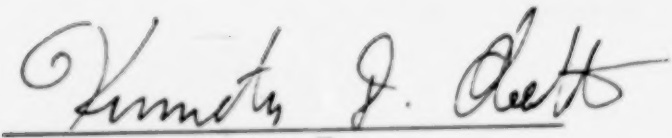
X. CERTIFICATION OF MEMBERSHIP

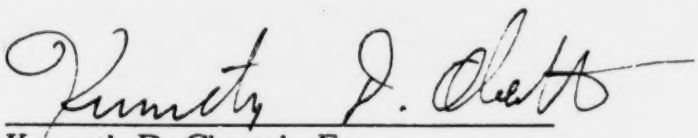
It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

XI. PROOF OF SERVICE

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Deborah W. Babcox, Esq., 222 West Washington Street, Bradford, PA 16701 and Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 10th day of November, 1988.



Kenneth D. Chestek, Esq.

88-802

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A. Opinion and Order, U.S. Court of Appeals for Third Circuit, No. 87-3637, September 12, 1988, reported at 1988 U.S. App. LEXIS 12303

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-3637

KATHLEEN STONEKING

v.

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller
and Frederick Shuey,

Appellants

On Appeal from the United States District
Court for the Western District
of Pennsylvania (ERIE)
(D.C. Civil No. 87-00063 E)

Argued February 3, 1988

Before: SLOVITER, STAPLETON, and MANSMANN,
Circuit Judges

(Filed September 12, 1988)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Facts

This is an appeal by the individual defendants from the district court's order denying their motion for summary judgment on the grounds of qualified immunity in an action brought under 42 U.S.C. § 1983 (1982). We have jurisdiction of this appeal under 28 U.S.C. § 1291 (1982). *See Mitchell v. Forsyth*, 472 U.S 511, 530 (1985); *Hynson v. City of Chester*, 827 F.2d 932, 933 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 702 (1988). Our review of a grant or denial of summary judgment is plenary and, like the district court, we must view the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 255 (1986); *see also Hynson*, 827 F.2d at 933.

In *Mitchell*, the Supreme Court stated that "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." 472 U.S. at 526. Defendants agree that in this case we need look only at the pleadings. Appellants' Brief at 5. We turn, therefore, to the allegations of the complaint.

Kathleen Stoneking, during the relevant period a student at the Bradford Area High School, brought this action against the Bradford Area School District, Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the Bradford Area School District.

She alleges that the School District hired Edward Wright to serve as its band director in 1976; that during Wright's tenure as band director the band won numerous competitions and Wright enjoyed strong support and backing of the School District and its officials; that a female member of the band informed Principal Smith in 1979 that Wright had attempted to rape and/or sexually assault her but that Smith failed to conduct an investigation or report the allegations to appropriate authorities and instead required the student to issue a public apology to Wright and retract her allegations; that Smith instructed Wright to have no further "one on one" contact with female band members; that plaintiff Stoneking participated in the band during her sophomore, junior and senior years until her graduation in 1983; and that beginning in October 1980 and continuing thereafter until May of 1985, Wright, through physical force, threats of reprisal, intimidation and coercion, sexually abused Stoneking, harassed her, and forced her to engage in various sexual acts with him at various places, including the high school's band room and its

environs, Wright's vehicle and house, and on trips for band functions. The complaint also alleges that in March 1986 Wright resigned after a psychologist reported a complaint concerning Wright's sexual abuse of another female band member, and that he was thereafter prosecuted criminally for various sex-related crimes.

Stoneking pleads that there was a special custodial relationship between herself and the defendants, that Smith and Miller had actual notice of the allegations of Wright's sexual misconduct and that Shuey either knew or recklessly failed to discover that Wright was sexually abusing female band members. She alleges that the defendants were intentionally, recklessly and deliberately indifferent to the health, safety and welfare of the female student body in general and the plaintiff in particular in that they failed to report the various incidents of suspected sexual abuse of female band members by Wright; failed to adopt an effective policy or policies to prevent the sexual abuse of female students and to promptly report complaints of such abuse to appropriate authorities; failed to properly and vigorously investigate reports of sexual abuse by Wright of female band members; concealed from parents of female band members and public officials the various complaints and accusations that had been made against Wright since 1979; continued to permit Wright to function as band director despite actual notice that he presented a significant threat; and encouraged and perpetuated the custom and course of conduct at the high school whereby allegations of sexual abuse or mistreatment by Wright and other teachers were not investigated and reported. Stoneking alleges that as a result she suffered severe psychological trauma, including severe depression, loss of self-esteem, mental anguish, embarrassment and humiliation, and she seeks compensatory and punitive damages.

In their answer,[1] defendants deny most of the allegations directed to liability but admit that in 1979 Smith questioned a female band member regarding a possible relationship with Wright, allege that the student denied the relationship and said she had fabricated the story, admit that in 1984 Smith directed Wright not to place himself in a one-on-one situation with female students, admit that Superintendent Shuey was advised of the actions taken by Smith with respect to Wright, and admit that Smith had a chronological miscellaneous file with notations concerning matters raised about Wright.

Following some discovery, defendants moved for summary judgment on the ground, *inter alia*, of qualified immunity.[2] They contended that "no clearly settled law existed, either at the time of the incidents complained of in the plaintiff's Complaint or as of the present time, which would cause a reasonable person to know either of the constitutional right which allegedly has been violated or that the alleged acts or failure to act on the part of the individual defendants

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1. Defendants filed their answer after the court denied their motion to dismiss raising, *inter alia*, qualified immunity as a defense.

2. The defendants also asserted that Stoneking's federal claim was barred by the applicable statute of limitations, that Stoneking had not established a violation of her constitutional rights, and that she had failed to state a cause of action under either section 1983 or state law. The district court denied the motion as it pertained to the federal claim, but granted it as to the state law claim, stating that "the pleadings are not sufficient to give notice of the claim alleged." Stoneking v. Bradford Area School Dist., 667 F. Supp. 1088, 1103 (W.D. Pa. 1987). The district court later certified its order as it related to the statute of limitations issue for interlocutory appeal and continued the trial of the case pending appeal. By an order dated October 13, 1987, this court denied defendants' petition for permission to appeal the district court's ruling on the statute of limitations issue. Stoneking v. Bradford Area School Dist., No. 87-8061 (3d Cir. Oct. 13, 1987).

would lead to a violation of that constitutional right." Defendants' Motion for Summary Judgment, *Rovito v. Bradford Area School Dist.*, No. 86-133 (W.D. Pa.) (filed April 10, 1987).[3]

The court denied summary judgment on the qualified immunity ground. *Stoneking v. Bradford Area School Dist.*, 667 F. Supp. 1088, 1102 (W.D. Pa. 1987). In its opinion, the court referred to evidence submitted in the cases with which this action was consolidated, *see supra* note 3,[4] including the affidavit of Dr. Chet C. Kent, Superintendent of Keystone Oaks School District, which stated that the policies adopted by the defendants for dealing with suspected cases of sexual assault or sexual harassment deviated significantly from the norm. 677 F. Supp. at 1097-98. The court held that plaintiff had alleged violation of a clearly established constitutional right and that there was evidence by which a jury could conclude that defendants were reckless in their handling of the 1979 incident which involved Judy Grove,[5] in their failure to

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3. Defendants' motions incorporated by reference their comparable motions filed in similar actions filed by two other Bradford Area High School students, Kim Harbaugh and Lisa Rovito, who allege that they were sexually abused by Wright and assert liability on the same basis as does Stoneking. Prior to ruling on the summary judgment motion, the district court consolidated Stoneking's actions for trial with those of Harbaugh and Rovito. *See* 667 F. Supp. at 1089 n.1.

4. In response to an order entered by this court on June 20, 1988, the district court entered an order on July 7, 1988 supplementing the Stoneking record with the materials submitted in the *Harbaugh* and *Rovito* cases.

5. There is evidence that in the fall of 1979, Judy Grove, a female band member, complained to Smith and Miller that Wright had sexually assaulted her, that Grove's complaint was confirmed to Smith and Miller both by Grove's father and by an independent student counselor and that Smith and Miller responded by presenting Grove with the choice of either withdrawing from the

investigate other reported incidents involving Wright and female students,[6] and in their attempts to remedy and/or rectify the problems involving Wright.[7] The court held that in light of the above, the issue of liability is one for the jury to decide.

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band or publicly recanting her story. Grove testified that in 1979, Smith instituted a policy whereby Wright was forbidden from having one-on-one contact with any female student. Defendants' answer admits that Shuey had knowledge of the 1979 Grove incident. Dr. Chet C. Kent opines that the handling of the Grove incident was "so far below the minimum accepted and generally prevailing administrative standard that [it] constituted deliberate or recklessly indifferent conduct . . . ." Affidavit of Chet C. Kent, submitted by Kim Harbaugh in response to Defendants' Motion for Summary Judgment (hereinafter Kent Affidavit) at 17.

6. There is evidence that, for example, in 1984, the year following Stoneking's graduation from the Bradford Area High School, another female band member complained to Smith that she was being sexually abused by Wright. In response, Smith reiterated the no one-on-one policy between Wright and female students that he had instituted in connection with the Grove incident, and told Wright not to discuss the incident with anyone. Smith also informed Shuey of the student's complaint and of the actions that he had taken in response. Kent concludes that in view of the fact that neither Smith nor Shuey investigated the complaint, informed the student's parents, called the child abuse hot line, or disciplined Wright in any way, "their behavior demonstrates deliberate or reckless indifference and callous disregard for [the student's] safety." Kent Affidavit at 18.

The factual nature of the evidence before the court, *see also supra* note 5 and *infra* note 7, thus distinguishes this case from that of Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988), on which defendants rely, where the court stated that "in the case at bar, Appellants have not pled any *facts* to suggest that any of the Appellees had notice of [the teacher's] dangerous proclivities." *Id.* at 171 (emphasis in original).

7. The records in the companion cases are replete with evidence of instances of students' complaints to one or more of the defendants of sexual misconduct by various teachers at the

Although, as we noted above, ordinarily qualified immunity can be determined on the basis of the pleadings, the Supreme Court has recognized, as do our cases, that there may be instances in which discovery may be necessary before a motion for summary judgment on qualified immunity grounds can be resolved. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987); *see also Brown v. United States*, 851 F.2d 615, 617 (1988) (record insufficiently developed on qualified immunity issue); *Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987) (legal issues on the qualified immunity question "inextricably intertwined" with the factual issue requiring discovery before determination of qualified immunity issue).

Bradford Area High School. These included a female student's complaint in 1978 that a teacher had made sexual advances to her while she was alone with him in his classroom correcting papers, to which Smith responded by telling her that it would be her word against the teacher's and warning her not to tell her parents; a female student's complaint in January 1981 that the same teacher had kissed her on the neck; another student's complaint in March 1981 that the same teacher had blindfolded her in a sensitivity test and then gotten down on his hands and knees and looked up her dress; another student's complaint in November 1982 that the teacher had asked her to sit on his lap during a party; and a 1985 complaint from the father of a female student that the teacher had placed his hands on his daughter's body. Other incidents included that of a different teacher's having written a suggestive note to a student, and another teacher having had an affair with a student. There is no evidence that defendants investigated or reported any of these complaints, leading Dr. Kent to conclude that, at least as to defendants Smith and Shuey, their behavior "encouraged a climate to flourish where innocent girls were victimized," Kent Affidavit at 20, and that, had Smith and Shuey taken appropriate steps, "Wright would have been prevented from preying on other female band members and a safe school environment would have been created for all girls." Kent Affidavit at 22.

In this case, however, defendants are content to stand on the pleadings. The basis for their claim of immunity was that Stoneking did not have a clearly established right to be free from the sexual abuse of Wright, a member of the school's staff, that they were under no clearly established duty to protect her, and that, in any event, they could not reasonably have known that their conduct might violate any of Stoneking's constitutional rights. Because this argument is premised on the assumption that the facts alleged by Stoneking in her complaint are true, we can evaluate the district court's denial of summary judgment on the qualified immunity issue without consideration of the facts adduced on summary judgment, and refer to those facts only to the extent that they amplify the allegations of the complaint.

II.

Qualified Immunity

The doctrine of qualified immunity entitles government officials performing discretionary functions to immunity from liability for civil damages when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The question before us is whether reasonable school officials in the position of defendants and with the information then available to them should have known that their alleged actions or omissions were unlawful. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987) (qualified immunity issue is whether "a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed").

In this case, where all parties agree that the existence of qualified immunity may be determined

from the pleadings, we need not be concerned with any issue relating to the burden of proof, but rather only with an objective, legal determination of whether the rights alleged were clearly established. *See Harlow*, 457 U.S. at 818-19. *See generally* S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 8.16, at 511 (2d ed. 1986) ("As to the question of the existence of clearly settled law, to speak of a burden of proof with its evidentiary emphasis appears misplaced. . . . [W]hether clearly settled law existed at the time a defendant acted is an issue of law for the court.").

The Supreme Court has recently offered guidance as to what is meant by a "clearly established right," explaining that,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson, 107 S. Ct. at 3039 (citations omitted). *Anderson* thus supports our precedent interpreting the "clearly established" standard as "requiring some but not precise factual correspondence [between the relevant precedents and the conduct at issue] and demanding that officials apply general, well developed legal principles." *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144 (3d Cir. 1984); *accord Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987).

The right that Stoneking alleges defendants violated is her "liberty interest to be free in her person from threats, intimidation and sexual abuse as that perpetrated by Wright." App. at 13. Substantial

authority supports the district court's holding that a student has a liberty interest in being free from physical abuse in school. As the court stated in *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980), a case involving corporal punishment of a student at school,

> [t]he existence of this right to ultimate bodily security -- the most fundamental aspect of personal privacy -- is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible.

This right was established no later than 1977, when the Supreme Court in *Ingraham v. Wright* held that "corporal punishment in public schools implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977); *see also Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987) (law clearly established by 1982 that excessive corporal punishment could violate student's substantive due process rights), *cert. denied*, 108 S. Ct. 1220 (1988); *cf. Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (constitutionally protected liberty interest of persons confined in mental institution to safe environment); *Milonas v. Williams*, 691 F.2d 931, 942-43 (10th Cir. 1982) (due process rights of children in quasi-juvenile detention facility violated by certain physically abusive disciplinary practices), *cert. denied*, 460 U.S. 1069 (1983); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (constitutional right of persons confined in mental hospital to be free from physical assault by other patients).

Defendants' attempt to distinguish these cases on the grounds that they involved physical, rather than sexual abuse, is unpersuasive. The right at issue is that of personal bodily integrity.[8] We agree with the district court that "common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling." *Stoneking*, 667 F. Supp. at 1094. We therefore hold that Stoneking had a constitutionally protected right to be free from sexual abuse by her school teachers that was clearly established by 1979, when defendants were put on notice of Wright's alleged abuse of a female student.

In fact, defendants at oral argument conceded that the sexual abuse of Stoneking by Wright was a "constitutional tort," derogating by this concession from their argument that Stoneking had no liberty interest protected by the substantive component of the due process clause. Instead, their argument is that they, in their capacity as school administrators, did not have at the relevant time, and indeed do not now have, a "clearly established" affirmative duty to take steps to protect school children from sexual abuse by a third party, including a staff member. They seek to distinguish the Supreme Court cases delineating state officials' obligation to take affirmative steps to protect a victim of violence on the ground that they arose in a custodial situation, and argue that school administrators do not have the type of special relationship with school children recognized by the law that imposed on them a duty to act in such situations.[9]

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8. In her deposition Stoneking testified that Wright fondled and kissed her breasts, inserted his fingers into her vagina, exposed himself to her and forced her to handle his genitals, and occasionally compelled her to have oral sex with him. Stoneking Deposition II at 341-44, 351-52.

9. This aspect of defendants' qualified immunity argument is properly before us on this appeal. As we held in Chinchello v.

Defendants' argument that they had no legal duty to Stoneking is based on cases such as *Martinez v. California*, 444 U.S. 277 (1980), where the Court affirmed the dismissal on proximate cause grounds of a suit against state officials who had paroled a dangerous felon seeking damages for the felon's torture and murder of a fifteen-year old girl five months after his release. The Court explained that, "[t]he parole board was not aware that [plaintiffs'] decedent, as distinguished from the public at large, faced any special danger." *Id.* at 285. Following *Martinez*, this court also held that county officials could not be held liable for the murders of residents in a nearby community committed by an escaped county prisoner. *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12 (3d Cir. 1987).

These cases do not hold, however, that state officials can never be liable for harm committed by a third party. In fact, the Court in *Martinez* cautioned that "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." 444 U.S. at 285 (footnote omitted). In *Russell*, we stated that "[i]t is clear . . . that § 1983 is not limited to cases of direct harm inflicted by state officials. This is suggested by the distinction made in *Martinez* between that victim there and those who the authorities knew face a 'special danger.'" 825 F.2d at 16.

It is incontestable that custodians have some duty to protect those in their custody from physical abuse by

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Fenton, 805 F.2d 126, 131 (3d Cir. 1986), the "absence of a clearly established legal duty . . . can accurately be described as a contention that [defendant] violated no clearly established legal norm" and "treating [that contention] in this manner will best serve the objectives of *Mitchell*." Of course, this contention must be distinguished from the "I didn't do it" defense, of which we cannot take cognizance at this stage. *Id.*

third persons. *See Youngberg*, 457 U.S. at 324 ("state . . . has the unquestioned duty to provide reasonable safety for all residents . . . within the institution [for the mentally retarded]"); *see also Spence*, 507 F.2d at 557; *cf. Estelle v. Gamble*, 429 U.S. 97 (1976) (Eighth Amendment right of prisoner to be provided with adequate medical treatment). Cases after *Martinez* have held that such a duty is not limited to the custodial relationship. Thus, in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), we held that if a state social services agency is aware that a particular child has been abused, a special relationship arises that creates an affirmative duty on the part of the state agency to protect that child from further abuse. *See Wood v. Ostrander*, 851 F.2d 1212, 1218 (1988) (law clearly established that police officer has duty under section 1983 not to abandon passengers of arrested drivers thereby exposing them to unreasonable danger); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (in banc) (holding that "a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action [against the foster care agency] for violation of fourteenth amendment rights [for failure to protect foster children from abuse]"); *Doe v. New York City Department of Social Services*, 649 F.2d 134, 145-46 (2d Cir. 1981) (state foster care agency has an affirmative duty to protect a child from physical and/or sexual abuse inflicted by the child's foster parents); *White v. Rochford*, 592 F.2d 381, 383-86 & n.6 (7th Cir. 1979) (allegations that police officers, after arresting an adult driver, left the children passengers alone in the car on a busy highway in cold weather stated a claim under the Fourteenth Amendment); *Doe "A" v. Special School Dist.*, 637 F. Supp. 1138, 1143-45 (E.D. Mo. 1986)

(substantive due process right of school children not to be sexually abused by school bus driver); *see also Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). *Contra Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 932 (8th Cir. 1987); *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 1218 (1988).

Stoneking's relationship vis-a-vis her school's principal, assistant principal, and even school district superintendent, is patently not comparable to that of an unidentified "member of the general public, living in the free society, and having no special custodial or *other* relationship" with state parole officers who released a parolee. *See Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983). Although she was not in a technical sense in defendants' legal "custody," as was the child in *Bailey* and *Taylor*, she was a member of a known and identifiable class of potential victims -- female students in general, and female band members in particular.

Under Pennsylvania law Stoneking was required to attend school. *See* 24 Pa. Stat. Ann. § 13-1327 (Purdon Supp. 1988); *see also* 24 Pa. Stat. Ann. § 13-1333 (Purdon Supp. 1988) (imposing penalty of fine and/or jail on parents and guardians who violate compulsory education statute). Because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities, at least at the time they are present.

It is abundantly clear that "the state has expressly stated its desire to provide affirmative protection" to students. *See Bailey*, 768 F.2d at 509; *see also Jensen*, 747 F.2d at 194-95 n.11. The Pennsylvania Child Protective Services law, 11 Pa. Stat. Ann. § 2202 *et seq.*, provides that "school administrator[s]" are mandated to report suspected child abuse, 11 Pa. Stat.

Ann. § 2204(c) (Purdon Supp. 1988). Even if they were under no statutory duty to report suspected instances of sexual assault perpetrated by teachers, as opposed to that inflicted by parents and other "person[s] responsible for the child's welfare," *see Pennsylvania State Educ. Assoc. v. Department of Public Welfare*, 68 Pa. Commw. 279, 449 A.2d 89 (1982), the Act reflects the state's broad policy "to encourage more complete reporting of suspected child abuse and . . . [to] provid[e] protection for children from further abuse," 11 Pa. Stat. Ann. § 2202 (Purdon Supp. 1988). *See generally*, Beaty & Woolley, *Child Molesters Need Not Apply: A History of Pennsylvania's Child Protective Services Law and Legislative Efforts to Prevent the Hiring of Abusers by Child Care Agencies*, 89 Dick. L. Rev. 669 (1985).

Moreover, Pennsylvania law has since 1911 explicitly vested school officials with authority *in loco parentis* over students. *See* 24 Pa. Stat. Ann. § 13-1317 (Purdon Supp. 1988);[10] *cf. New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) ("[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies"). The importance that Pennsylvania attaches to the educational process is apparent from its very Constitution, which provides "for the maintenance

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10 24 Pa. Stat. Ann. § 13-1317 provides:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. 3, § 14. Indeed, the statute permitting termination of a teacher's contract for, *inter alia*, "immorality", *see* 24 Pa. Stat. Ann. § 11-1122 (Purdon 1962), was construed to cover termination of a teacher who had proposed spanking two female high school students in a manner which the students perceived as sexual in nature. *See Penn-Delco School Dist. v. Urso*, 33 Pa. Commw. 501, 382 A.2d 162 (1978).

Even if there were no other Pennsylvania statutes explicitly directed to the obligation of school administrators to protect school children,[11] the duty owed by a school official to protect students from the tortious or criminal conduct of teachers has long been established in the common law.[12] *See* W. Keeton, *Prosser and Keeton on the Law of Torts*, § 56, at 383 (5th ed. 1984); *see, e.g., Wagenblast v. Odessa School District*, 110 Wash.2d 845, 758 P.2d 968 (1988) (public school may not condition participation in interscholastic athletics on students releasing school district from all potential negligence claims because, *inter alia*, "school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for

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11. A Pennsylvania statute effective January 1, 1986 provides that prospective school employees who have direct contact with children may not be hired if they have been convicted of, *inter alia*, statutory rape, indecent assault, sexual abuse of children, and corruption of minors within the preceding five years. 24 Pa. Stat. Ann. § 1-111 (Purdon Supp. 1988).

12. Although a state law duty is not equivalent to a constitutional duty, *see* Archie v. City of Racine, 847 F.2d 1211, 1216-19 (7th Cir. 1988), that body of law may be instructive as to the duty owed. *See, e.g.*, Doe v. New York City Dep't of Social Services, 649 F.2d at 145-46.

protecting the children in its custody from such dangers"); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 1243-44 (1986) (school district may be held liable for its negligence arising out of teacher's sexual assault of students); *Galli v. Kirkeby*, 398 Mich. 527, 248 N.W.2d 149, 152 (1976) (school board may be liable, under theory of respondeat superior, for principal's homosexual assaults on a student); *Schultz v. Gould Academy*, 332 A.2d 368, 370-71 (Me. 1975) (boarding school liable when intruder gains access to dormitory room and criminally assaults female student).

As embodied in the Restatement (Second) of Torts § 320 (1965), expressly made applicable to school officials in comment a,

> [o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

See also id. § 315 (duty may arise where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third party's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection").

While Pennsylvania school officials, like its other government officials, enjoy a broad statutory immunity,[13] the fact that defendants may be immune under state law does not detract from the existence of a common law duty, nor does it alter their potential liability under section 1983. *See Wade v. City of Pittsburgh*, 765 F.2d 405, 407-08 (3d Cir. 1985).

There is thus an adequate basis from the Pennsylvania child abuse reporting and *in loco parentis* statutes, coupled with the broad common law duty owed by school officials to students, to conclude there was a desire on the part of the state to provide affirmative protection to students.

It follows that if, as we must assume from the complaint, the defendants knew, or should have known, at least as early as 1979 from the Grove incident, of Wright's sexual misconduct with a female band student, they were on notice that female band members faced a "special danger." *See Martinez*, 444 U.S. at 285. In these circumstances, defendant school officials had a constitutional duty to investigate and take reasonable steps to protect the students. Defendants stated at oral argument that they had a duty to investigate the complaints but not a duty to protect the students. The distinction is meaningless,

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13. *See* 42 Pa. Cons. Stat. Ann. §§ 8541, 8542 (Purdon 1982). *See generally* Note, *Judicial Clarification of a Common Law Doctrine: the Pennsylvania Doctrine of Official Immunity*, 84 Dick. L. Rev. 473 (1980). Pennsylvania courts interpret the immunity statute broadly, and the exceptions thereto narrowly. *See* City of Philadelphia v. Love, 98 Pa. Commw. 138, 509 A.2d 1388 (1986), *appeal granted*, 514 Pa. 644, 523 A.2d 1132 (1987); *see also* Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988) (affirming dismissal of plaintiff's complaint against school officials arising out of their failure to protect young school children from teacher's sexual assault on grounds that plaintiff failed to plead sufficient factual or legal predicate to establish willful misconduct exception to governmental immunity, 42 Pa. Cons. Stat. Ann. § 8550 (Purdon 1982)).

because the duty to investigate must also encompass some duty to act based on the results of the investigation.

Even if we were to accept defendants' argument, which is unsupported by any court decision, that state officials have the affirmative duty to protect individuals "only in situations where individuals are helpless to protect themselves from harm and government officials in a position to prevent this harm are made aware of or have actually caused the individuals to be in a position where they are helpless to protect themselves," Appellant's Brief at 19, the allegations of the complaint satisfy this standard. Surely impressionable teenagers faced with sexual harassment by a school authority figure cannot be deemed the emotional equivalents of independent adults.

Defendants state that "the right asserted by [Stoneking] was not established in 1979 by clearly established law," Appellant's Brief at 11, but limit their argument on this issue to their contention that their response to the 1979 allegations was objectively appropriate. Even though they never expressly argue that many of the section 1983 cases which have expounded upon the special relationship which gives rise to a duty to protect from harm by third parties had not been decided in 1979, when defendants were put on notice of Wright's activities, *compare Jensen*, 747 F.2d at 194-95 (constitutional right of affirmative protection not clearly established until after 1980), we consider that argument and reject it.

We do so relying not only on section 1983 cases,[14] but also on the entrenched common law duty owed by a

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14. There was substantial authority by 1979 that state officials have a duty to protect institutionalized persons from self-injury or assault by fellow inmates and staff, *see, e.g.*, Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978); Spence v. Staras,

school official to protect students from attacks by teachers. Furthermore, after *Ingraham v. Wright* was decided in 1977, every reasonable school official should have known that it was a breach of this duty knowingly to stand by and take no action to protect a student from a beating administered by a faculty member. Since, as we noted above, sexual abuse is at least as traumatic as physical abuse, it is implausible that by 1979 reasonable school officials would not have known that there was a duty to take some affirmative action to investigate and protect students from a teacher's sexual abuse of which they were made aware, and to take steps to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity.

Finally, defendants argue that we cannot sustain the district court's order denying their defense of qualified immunity unless we find their direction to Wright in 1979 to avoid one-on-one contact with female students was objectively inadequate. We cannot reach this issue at this stage of the litigation because it goes

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507 F.2d 554, 557 (7th Cir. 1974), and holding that a prisoner has a constitutional right to a safe environment and that the prison officials have a corresponding duty to reasonably insure that safe environment to prisoners, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (obligation to provide medical treatment); Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983) (pretrial detainee's right to be protected from another inmate's physical and sexual abuse clear as of at least 1979); *see also* Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (prisoner's right to be protected from beating by guard). Further, Stoneking did not graduate until 1983, by which time the legal principles were even more clearly established. *See* Youngberg v. Romeo, 457 U.S. 307 (1982); *cf.* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (even in non-custodial situations, "if the state puts the man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much as active tortfeasor as if it had thrown him into a snake pit.")

to the merits of the plaintiff's section 1983 claim. It is thus akin to the "I didn't do it" defense which is not cognizable at this stage. *See Chinchello*, 805 F.2d at 131.

The ruling in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), that denial of qualified immunity claims will be immediately appealable has imposed on the courts of appeals the responsibility of drawing the elusive line between the existence of a "clearly established" right and the question whether the conduct at issue violated that right. In this case, there is an expert affidavit countering defendants' bald contention that their response to the allegations of misconduct fell within the parameters of their reasonable professional judgment.[15] This creates a fact issue which must be determined by the factfinder. We express no view either as to whether defendants' conduct rose to the level actionable under section 1983, *see Colburn v. Upper Darby Twp.*, 838 F.2d 663, 667-70 (3d Cir. 1988), or as to the reasonableness of defendants' conduct in this case.

III.

Conclusion

For the reasons expressed herein, we will affirm the order of the district court denying defendants summary judgment on qualified immunity grounds and remand for further proceedings consistent with this opinion.

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15. In *Youngberg*, 457 U.S. at 323 (footnote omitted), the Court held there would be liability only if defendants' conduct was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [they] actually did not base the decision on such a judgment."

STAPLETON, *Circuit Judge*, dissenting.

A school teacher, school administrator, or anyone else acting under color of state law clearly violates the Constitution if he or she sexually abuses a student. That principle is not helpful here, however, because this suit does not involve a claim against Wright. Accordingly, the court's opinion attempts to establish that school officials owe a "constitutional duty to investigate" any complaint regarding conduct, presumably by anyone, that might possibly pose a threat to the "personal bodily integrity" of school children within their jurisdiction and a resulting constitutional duty to protect from harm any child whom that investigation might have disclosed to be at risk. While I have substantial reservations about the soundness of this legal conclusion, this appeal provides no occasion to embrace or reject it. The appellants are entitled to immunity unless it should have been readily apparent to them based on the previously decided cases that their failure to do more about the 1979 complaint concerning Wright would violate the constitutional rights of one in Stoneking's position. The court has found no case from which its "constitutional duty to investigate" is "readily apparent" and that should be the end of the matter. Even assuming that the court's analysis is ultimately determined to have merit, the Supreme Court has made it crystal clear that public officials must not be required to predict the advance of constitutional law at their peril.

We have held that a state official has an affirmative duty to protect another from third parties if, but only if, a "special relationship" exists between the two. We have found such a relationship between employees of a state social services agency and a child placed by the agency whom the employees know to be in jeopardy. *Estate of Bailey by Oare v. County of York*, 768 F.2d

503 (3d Cir. 1985). While the Supreme Court has not yet put its imprimatur on the "special relationship" doctrine, a number of other Courts of Appeals have embraced it and, for present purposes, we may accept it, *arguendo*, as clearly established law. *See, e.g., Jensen v. Conrad*, 747 F.2d 185, 193-95 (4th Cir. 1984) (reviewing prior caselaw on "special relationship" doctrine and stating guidelines for "special relationship" analysis, but holding defendant state and county social services agency officials entitled to immunity from suit alleging failure to protect abused children because the law as it affected them was not clearly established at the time of the alleged wrongdoing), *cert. denied* 470 U.S. 1052 (1985); *Taylor v. Ledbetter*, 818 F.2d 791, 797-98 (11th Cir. 1987) (in banc) (analogizing to prison context, finding that a special relationship exists between state foster care agency officials and foster children); *cf. DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298, 303 (7th Cir. 1987) (recognizing special relationship in prison context, but finding "no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship'"), *cert. granted* 108 S. Ct. 1218 (1988); *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923, 926 (8th Cir. 1987) (agreeing with Seventh Circuit that special relationship concept is applicable only in prison or prison-like environments). Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.

The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school

administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students within the district is clearly distinguishable from that between a social worker and her five-year old ward or that between a jailer and his incarcerated charge. Indeed, the differences between the warden-prisoner relationship and the relationship of school officials to schoolchildren were recognized by the Supreme Court in *Ingraham v. Wright*:

> The prisoner and the schoolchild stand in wholly different circumstances, . . .
>
> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during the school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. 651, 670 (1976). The same characteristics distinguish the situation of the schoolchild from that of the foster child. As the Eleventh Circuit said in *Taylor v. Ledbetter*, in the course of finding an analogy between the situation of a foster child and that of a prisoner,

> *Ingraham v. Wright* . . . is not a bar to this holding. . . . In *Ingraham*, the Court discussed the cost of providing additional benefits and safeguards to school children threatened with punishment. It found the cost of benefits and additional safeguards high and the risk of harm to school children low. In the foster home setting, recent events lead us to believe that the risk of harm to children is high. . . . Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.

818 F.2d at 797.

Because of these distinctions, I would be reluctant to deny immunity to these defendants even if the plaintiff were Ms. Grove and Wright's assault on her had followed her complaint about him. We need not decide that issue, however. It is one thing to hold that a public school administrator has a duty to protect a particular student within his or her jurisdiction whom he or she knows to be in particular jeopardy. It is another to hold that there is an affirmative duty to protect an individual in a position like that of Stoneking, whom the administrator had no reason to believe was any more at risk from sexually aggressive teachers than her female classmates.[1] The court points

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1. To say, as does the court, that Stoneking "was a member of a known and identifiable class of potential victims -- female students in general, and female band members in particular" serves neither to cabin the newly-created liability nor to bring this case within the scope of a precedent of which these school administrators should have known.

to nothing that should have made the leap between these two propositions apparent to these school administrators. Indeed, authorities relied upon by the court suggest that there is no duty to protect in the absence of notice that a particular individual is in peril. In *Jensen v. Conrad*, for example, the court described its prior caselaw on special relationships as having held such relationships existed "with respect to inmates in the state's prisons or patients in its mental institutions *whom the state knows to be under specific risk of harm* from themselves or others in the state's custody or subject to its effective control." 747 F.2d at 193 (emphasis supplied). And in *Estate of Bailey*, we held that a special relationship and concomitant affirmative constitutional duty arises where a state social services agency is aware that *a particular child* has been abused. *See also Wood v. Ostrander*, No. 87-3924, slip op. at 8551-56 (9th Cir. July 13, 1988) (holding that a police officer was not entitled to qualified immunity where he had arrested Wood's male companion, taken the car keys, and left Wood stranded in a high-crime area five miles from her home at 2:30 a.m., and reasonably should have been aware of the danger to Wood); *White v. Rochford*, 592 F.2d 381, 383-86 (7th Cir. 1979) (holding that police officers were not entitled to qualified immunity where they had arrested the uncle of three minor children, leaving the children stranded in the car on a busy eight-lane expressway, and could not have avoided knowing of the danger to the children).

Because the court here holds the defendant officials personally liable in damages for the commission of a constitutional tort that is established as such only by the opinion in this case, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

B. Order, Sur Petition for Rehearing, U.S. Court of Appeals for Third Circuit, No. 87-3637, October 5, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Kathleen Stoneking

v.

Bradford Area School District et al.

Appellants

SUR PETITION FOR HEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges.

The petition for rehearing filed by

Appellants, Bradford Area School District et al.,

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Stapleton and Hutchinson would grant the petition for rehearing

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: October 5, 1988

C. Order, Stay of Mandate, U.S. Court of Appeals for Third Circuit, No. 87-3637, October 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3637

Kathleen Stoneking

vs.

Bradford Area School District, etc.
Frederick Smith, etc., Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 11, 1988.

/s/ Dolores K. Sloviter
Circuit Judge

Dated: October 14, 1988

D. Opinion and Order, U.S. District of Pennsylvania, No. 87-63 E, August 28, 1988, reported at 667 F.Supp. 1088 (1987), and U.S. Dist. LEXIS 7950

Kathleen Stoneking,

Plaintiff

v.

Bradford Area School District; Frederick Smith, in his individual and official capacity as principal of Bradford Area High School; **Richard Miller,** in his individual and official capacity as assistant principal of the Bradford Area High School and **Frederick Shuey**, in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

Civil Action No. 87-63 E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

667 F. Supp. 1088; 1987 U.S. Dist. LEXIS 7950

August 28, 1987

COUNSEL:

Deborah W. Babcox, Esquire, Pecora Duke & Babcox, for Plaintiff.

Kenneth D. Chestek, Esquire; James D. McDonald, Jr., Esquire, for Defendants.

OPINION

MENCER, J.

I. INTRODUCTION

On March 24, 1987, Kathleen Stoneking filed a civil rights action against Bradford Area School District ("School District"), Frederick Smith, the Principal of the Bradford Area High School, Richard Miller, the Assistant Principal of the Bradford Area High School and Frederick Shuey, the Superintendent of the School District.[1] The gravamen of the complaint is that the defendants violated the constitutional rights of the plaintiff by failing to remedy the situation that existed at the Bradford Area High School. According to the allegations in the complaint, the individual defendants knew or recklessly failed to discover that Edward Wright, the band director at the High School, was sexually assaulting female members of the band. Additionally, it is alleged that the School District had a practice or custom of failing to appropriately respond to complaints by female students of sexual abuse or harassment perpetrated by male teachers.

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[1]Pursuant to an order entered May 22, 1987, this case was consolidated for trial with similar actions filed on behalf of Kim Harbaugh and Lisa Rovito. Motions for summary judgment were filed in the Harbaugh and Rovito cases on April 13, 1987. At that time, the parties provided the court with extensive briefs and voluminous deposition testimony. The motions, briefs and deposition transcripts from the Harbaugh and Rovito cases have been adopted for the purposes of the pending summary judgment motion. Reliance on those briefs will simply be noted by reference to the "Companion Case."

The defendants have filed a motion for summary judgment. As set forth in their brief, the first ground for the motion is that the plaintiff failed to file her complaint in a timely fashion. The defendants also assert that the plaintiff failed to identify a constitutional right which has been violated. The defendants contend that as a matter of law there is no § 1983 claim because there is no individual liability nor is there any policy, practice or custom which would implicate the School District. In the alternative, it is asserted that defendants Smith, Miller and Shuey are entitled to qualified immunity. Finally, the defendants assert that the complaint fails to set forth state law violations.

After consideration of the briefs, the voluminous deposition testimony and the relevant case law, this Court concludes that: (1) there are genuine issues of material fact pertaining to the statute of limitations; (2) the plaintiff has alleged a violation of a well-established constitutional right; (3) there are genuine issues of material fact pertaining to the liability of defendants Smith, Miller and Shuey; (4) there are genuine issues of material fact regarding the existence of an "official practice or custom;" (5) defendants Smith, Miller and Shuey are not shielded from liability by the defense of qualified immunity and (6) the complaint does fail to set forth state law claims. Therefore, this Court shall deny the motion for summary judgment filed on behalf of the defendants, as it pertains to Counts I, III,

V and VII[2], and grant the motion as it pertains to Counts II, IV and VI.

II. FACTUAL BACKGROUND

In August, 1975, Edward Wright was hired by the Bradford Area School District to serve in the capacity of band director. Mr. Wright was responsible for instructing band activities and providing students with music lessons. Under Mr. Wright's direction, the high school band and individual band members were extremely successful in both regional and remote competitions. The band came to be the pride and joy of the school and the community. As the band's acclaim grew, so too did the acclaim of Edward Wright.

Three and a half years into Mr. Wright's tenure, a young woman by the name of Judy Grove[3] came forward and informed Dr. Smith, the School Principal and Mr. Miller, the Assistant Principal, that the band director had sexually assaulted her. At that time, Ms. Grove openly acknowledged that she had been drinking prior to the assault and that the assault had taken place at Mr. Wright's residence. The details of the events that followed

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[2]The final count in the complaint was mislabeled "Count V." It should, however, be Count VII.

[3]Since graduating from high school Judy has gotten married and her legal name is Judy Grove Sowers. For the purposes of this opinion, however, the Court will use the witness's maiden name.

Ms. Grove's disclosure are vigorously contested. All parties agree, however, that Dr. Smith ultimately appeared before the band to quiet the "rumors" and to encourage the band to work together again.

Mr. Wright's sexual abuse and harassment of Kathleen Stoneking began in the fall of 1980. The first incident of abuse consisted of Mr. Wright forcibly kissing Ms. Stoneking. As time progressed, the abuse greatly accelerated both in terms of frequency and in terms of intrusiveness. The sexual abuse continued, on an almost weekly basis, until Ms. Stoneking graduated from high school in the spring of 1983. As reported by the plaintiff, there were isolated incidences of abuse that occurred as late as May, 1985.

In early March, 1986 William Smith, Frederick Smith's son, informed his father that Mr. Wright was sexually assaulting female band members. Almost immediately after this information was conveyed to Dr. Smith, the School District responded. The parents of other students who had been assaulted were contacted. Several meetings followed which were attended by various administration officials, the parents of some of the girls who had been assaulted and the girls themselves. Mr. Wright was suspended as of March 10, 1986 and later resigned from his

job. Subsequently, Edward Wright pled guilty to a ten count indictment.[4]

III. STANDARD FOR SUMMARY JUDGMENT

In reviewing a motion for summary judgment, the Court is governed by the standard set forth in Fed.R.Civ.P. 56(c). In pertinent part the Rule provides "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine Issue as to any material fact and that the moving part is entitled to judgment as a matter of law."

The application of this standard requires that "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Baker v. Lukens Steel Co.*, 793 F.2d 509, 511

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[4]On a number of occasions, the defendants raised the issue of "consent." Accordingly, during the course of the depositions the girls who had been assaulted by Mr. Wright were quizzed on why they failed to "kick, slap, bite, hit, or knee" their teacher, Mr. Wright.

On November 6, 1986, Edward Wright plead guilty to criminal charges, including four counts of indecent assault. One of the elements of indecent assault is *lack of consent*. *See* 18 Pa. C.S.A. § 3126. By pleading guilty to the criminal charges Mr. Wright admitted that his victims had not consented.

The fact that Kathleen Stoneking choose not to immediately report the criminal acts of Edward Wright is, for the purpose of this proceeding, irrelevant. *Cf. Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) (The Court held that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'" *Id.* at 2406).

(3d Cir. 1986), citing, *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*. 429 U.S. 1038 (1977). Therefore, this Court must resolve all doubt, as to the existence of a genuine issue of material fact, in favor of the plaintiff.

IV. LEGAL DISCUSSION

A. Statute of Limitations

In its recent decision of *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court declared that all actions brought pursuant to 42 U.S.C. §1983 shall be characterized as personal injury actions and are subject, therefore, to the applicable state statute of limitations. In reaching this conclusion the Court instructed that: "[t]he characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course are matters of federal law. . . . [However,] the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id.* at 268-69. Therefore, for claims arising in Pennsylvania, federal courts must apply the two year statute of limitations set forth in 42 Pa. C.S.A. § 5524 (2). *See Sullivan v. City of Pittsburgh*, 811 F.2d 171, 180 (3d Cir. 1987); *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir.), *cert. denied*, 106 S. Ct. 349 (1985). Additionally, federal courts are bound to apply state tolling rules.

The well-established rule, regarding the tolling of the statute of limitations, is that the statute begins to run

when the liability-creating act is committed. *See Bernuth v. LeFever*, 325 Pa. 43, 47, 189 A. 342, 344 (1937) ("there is no evidence in the present record. . . which, from whatever angel viewed, would justify a postponement of the operation of the statute beyond the time 'when the injury was done.'"). In order to prevent the harsh results that would occur if that rule were applied in all situations, the courts have created an exception. This exception is known as the discovery rule. *See Lewey v. H. C. Frick Coke Co.*, 166 Pa. 536, 547, 31 A. 261, 263 (1895).

The Pennsylvania Superior Court discussed applicability of the discovery rule in *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 425 A.2d 428 (1980), *rev'd on other grds.* 496 Pa. 119, 436 A.2d 181 (1981). In that case, the court explained that, "the discovery rule is a judicial creation, fashioned to solve a specific problem, namely, whether the law should preclude recovery for an injury that not even a diligent party may reasonably be expected to discover." *Anthony*, 284 Pa. Super. 89, 425 A.2d at 432. The court went on to note that although the exception, as it was first applied involved the concealment of injury, "as the rule has developed it has become clear that its basis is not concealment by the defendant but rather the ability of the plaintiff to discover . . . [her] injury or its cause." *Anthony*, 284 Pa. Super. at 95, 425 A.2d at 436 (emphasis added). Thus, when the discovery rule is applicable the statute of limitations will not start to run until the plain-

tiff actually discovers the injury and the cause of the injury or reasonably should have discovered such.[5]

The role of the court in evaluating a plaintiff's assertion that the discovery rule should apply is limited.[6] The court must decide whether there is sufficient evidence by which a jury could reasonably decide that the plaintiff did not discover the injury or its cause until after the occurrence of the liability-creating act. Once a court makes that

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[5]Although the Pennsylvania Superior Court modified the discovery rule in *Cathcart v. Keen Industrial Insulation*, 324 Pa. Super. 123, 471 A.2d 493 (1984), that modification does not impact on the instant action. The court in *Cathcart* concluded that "an allegation of mere difficulty in identifying defendants . . . [is] not sufficient to toll the running of the statute of limitations." 324 Pa. Super. at 139, 471 A.2d at 501. Significantly, the court expressly decided not to overrule, *Grubb v. Albert Einstein Medical Center*, 255 Pa. Super. 381, 387 A.2d 480 (1978), an earlier case where the statute of limitations was tolled because the plaintiff had been unable to determine the causal relation between her injuries and the manufacturer of a medical instrument that allegedly caused her injuries. This Court concludes that the factual situation in the instant action is more akin to *Grubb*, than *Cathcart*.

[6]In evaluating an assertion that a claim is time barred, it is essential to keep in mind which party bears the applicable burden. Since the statute of limitations defense is an affirmative one, *see* Fed. R. Civ. P. 8 (c), the defendant bears the initial burden. If the plaintiff's response to this defense is that the statute of limitations should not run from the time the tortious act was committed, but rather from a later date when the plaintiff discovered the injury and its cause, i.e., if the plaintiff is relying on the discovery rule, then the burden shifts to the plaintiff. *Van Buskirk v. Carey Canadian Mines, Ltd*, 760 F.2d 481, 487 (3d Cir. 1985). The plaintiff must allege and thereafter prove that she did not have knowledge of her injury or the cause of that injury until some date after the liability creating act occurred. *Id.* Additionally, the plaintiff must prove that she was diligent in her efforts to discover the injury or the cause in a reasonable period of time. *Bickell v. Stein*, 291 Pa. Super. 145, 150, 435 A.2d 610, 612 (1981).

determination the remaining questions are for the jury. As the court in *Burnside v. Abbot Laboratories*, 351 Pa. Super. 264, 292, 505 A.2d 973, 988 (1985), recently pointed out: "[W]here the issue involves a factual determination regarding what is a reasonable period of time for a plaintiff to discover . . . [her] injury and its cause the determination is for the jury." *See also Taylor v. Tukanowicz*, 290 Pa. Super. 581, 586, 435 A.2d 181, 183 (1981).

In the instant action the plaintiff asserts that she did not discover that the individual defendants were the cause of her injuries until the School District took affirmative action to discipline and discharge Edward Wright.[7] Those events occurred in March, 1986. Thus, plaintiff contends that the two year statute of limitations should not run from that date. Defendants, on the other hand, insist that plaintiff was aware of the requisite facts at least by the time she graduated from Bradford Area High School, in June, 1983.[8]

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[7]Technically, Mr Wright was given an option to resign. Although he later exercised that option, it appears as though he had little choice in the matter.

[8]The defendants, opposition to the application of the discovery rule is somewhat tenuous. In order to have the requisite knowledge which would preclude the application of the discovery rule, prior to the running of the limitation period Ms. Stoneking would have had to have *known* that Judy Grove was in fact sexually assaulted by Edward Wright. Ms. Stoneking would have had to have *known* that the defendants received notice of the assault. Additionally, the plaintiff, would have had to have known that the defendants knew that Judy's allegations were true and that in, light of that

In addressing the court's role in determining whether a claim is time barred, the third circuit offered the advice that "[s]ince the applicability of the statute of limitations usually involves question of fact for the jury, defendants bear a heavy burden in seeking to establish as a matter of law that the challenged claims are barred." *Van Buskirk v. Carey Canadian Mines, LTD*, 760 F.2d 481, 498 (3d Cir. 1985). Reviewing the available evidence in the light most favorable to the plaintiff, this Court concludes that the defendants have not satisfied that heavy burden. There are genuine issues of material fact pertaining to the tolling of the statute of limitations. Therefore, the motion for summary judgment, as it pertains to the statute of limitations defense, is denied.

B. Evaluation of Section 1983 Claim

1. Identification of constitutional right

In pertinent part 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

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information they choose to disregard Judy's complaint. Thus, in order to be precluded from the application of the discovery rule, the plaintiff would have had to have *known* that certain events occurred, events that the defendants vigorously contend never did occur.

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The crux of any section 1983 action is a violation of a protected constitutional right. Thus, identification of the specific right is "not a mere academic exercise and is necessary in determining whether a cause of action may be maintained under § 1983." *Metcalf v. Long*, 615 F. Supp. 1108, 1113 (D.C. Del. 1985). *See also Fox v. Curtis*, 712 F.2d 84, 87 (4th Cir. 1983).

In the complaint, plaintiff alleges that the defendants, acting under color of state law, deprived her of her rights, privileges and immunities as secured by the Constitution. More specifically, the plaintiff alleges that she was deprived of her liberty interest which entitled her to be free from the constant threats, intimidation, sexual abuse and sexual harassment perpetrated by Edward Wright. Although the plaintiff does not expressly link her claim to the substantive due process clause of the fourteenth amendment, identification of the liberty interest serves that purpose. The critical question is whether such a right is cognizable under the fourteenth amendment.

In discussing the breadth of the fourteenth amendment the district court in *Metcalf* pointed out:

> Substantive due process is a nebulous term, the meaning of which readily changes depending on the context of the particular situation. Substan-

> tive due process derives from the idea that the framers of the Constitution intended to protect rights other than those specified. In deciding that certain rights not specified in the constitution are protected by the due process clause, the Court has looked to those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Metcalf, 615 F. Supp. at 1120. A review of the case law will assist in the task of determining whether the rights asserted by the plaintiff are so rooted in tradition and conscience to rise to the ranks of fundamental.

The Supreme Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977) is instructive in this area. The issue in *Ingraham* revolved around the use of corporal punishment in public schools. After deciding that the eighth amendment offered the school students no protection, the Court turned its attention to the fourteenth amendment due process clause.

In a summary fashion, the Court concluded that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated." *Ingraham*, 430 U.S. at 674. Thus, the Supreme Court recognized the existence of a substantive right to be free from bodily abuse.

Admittedly, the liberty interests asserted in the instant action are not identical to those asserted and recognized by the Supreme Court in *Ingraham*. However, common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling. The Supreme Court's view that corporal punishment implicates a constitutional liberty interest is persuasive evidence that allegations of sexual abuse and sexual harassment would raise to the same level.

Ingraham does not stand alone in this area; there are other cases that recognize a similar constitutional right. In *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) (*Doe I*), the issue was whether a state agency could be liable for failing to protect a child from the physical and sexual abuse inflicted by the child's foster father. The court did not identify the specific constitutional right that formed the basis for the § 1983 action, but it did devote significant discussion to the liability issue. It must be noted that in the absence of a constitutional violation there would be no need to consider liability. Thus, by inference alone, it can be concluded that the court in *Doe I* found that there existed a constitutional right to be free from physical and sexual abuse. *See also Doe v. New York City Department of Social Services*,

709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983) *(Doe II)*.[9]

This Court also finds *P.L.C. v. Housing Authority of the County of Warren*, 588 F. Supp. 961 W.D. Pa. 1984) and *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) to be persuasive. The plaintiff in *P.L.C.* brought a § 1983 action against the Authority after she was raped by the defendant's employee who entered her apartment with a key provided by the Housing Authority. In a summary fashion, Judge Weber noted that "plaintiff's right to be free from such bodily injury and harm is a right of constitutional magnitude." *P.L.C.*, 588 F. Supp. at 962.

The district court in *Doe "A"* reached a similar conclusion. That case was instituted by nine handicapped children who were physically beaten and sexually abused by the individual who drove them back and forth to school. The court's discussion, regarding the existence of a constitutional right, is insightful.

> The acts of abuse alleged by plaintiffs state a substantive due process claim. The acts intrude upon the personal privacy and bodily integrity of these children. The acts intrude in ways

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[9]In an opinion written by Judge Sloviter, sitting by designation on the Second Circuit, the court reversed the granting of a judgment notwithstanding the verdict. Accordingly, the court held that the evidence was sufficient for a jury to conclude that the state agency, acted with deliberate indifference in regard to the plaintiff's physical safety.

> more personal and private than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete. Moreover, these acts are keenly distressing given the helplessness and blamelessness of the victims. . . . The alleged acts of defendant Cerny [busdriver] and the alleged tolerance of these acts by SSD [the School District] and the individual defendants pass beyond the pale of common law torts. They shock the conscience of this Court.

Doe "A", 637 F. Supp. at 1145. Although this Court is not bound by the holding in *Doe "A"* it deliberately adopts that court's well-reasoned rationale and conclusion.[10]

Therefore, this Court holds that the constitutional right, to be free from state intrusions into the realm of personal privacy and bodily security, in the ways alleged in the

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[10]Additional support for this conclusion can be adduced from *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985). That case was brought by a father, on behalf of himself and his deceased child, after the brutal abuse inflicted on his daughter resulted, in her untimely death. In reviewing the district court's Fed. R. Civ. P. 12(b)(6) dismissal, the appellate court noted: "Significantly, the court did not hold that Aleta or her father did not have a cognizable constitutional right. *There is a liberty interest in being free from physical assault* that can be fairly attributed to the action of a state." *Id.* at 509 n.7 (emphasis added).

This court does not view the physical abuse that rose to a constitutional right in *Estate of Bailey*, to be qualitatively different from the infliction of sexual abuse and harassment experienced by the plaintiff in the instant action.

complaint, is well-established in law. The acts of sexual abuse, sexual harassment and intimidation inflicted by Edward Wright on Kathleen Stoneking, literally shocks the conscience of this Court. As evidenced by the case law, abuse of this type is not tolerated when the victim is a prison inmate or a patient in a state hospital. *See, e.g., Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980)[11]; *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974).[12] Clearly then, the constitution must offer school children similar protection. Thus, the Court unequivocally rejects the defendants, assertion that the facts of this case fail to support a violation of a constitutional right.

2. Color of State Law

a. Individual defendants

The next step in the evaluation of the plaintiff's § 1983 claim is determining whether the individual defendants

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[11]The issue in *Withers* was whether the plaintiff had an eighth amendment right to be free from abuse inflicted by fellow prisons. Accordingly, the court held: "A prisoner has a constitutional right 'to be reasonably protected from the constant, threat of violence and sexual assault from his fellow inmates.'" *Withers*, 615 F.2d at 161.

[12]The action in *Spence* was brought on behalf of a son who had been beaten to death by fellow patients in a state mental hospital. The plaintiff alleged that the defendants recklessly ignored the twenty odd beatings that had previously occurred. In reviewing a dismissal of the action, the appellate court held that, "[a]ssuming, as we must on a motion to dismiss, that the plaintiff can prove these allegations, the defendants inaction was of sufficient magnitude to constitute a deprivation of rights under § 1983." *Spence*, 507 F.2d at 557.

owed a specific duty to the plaintiff. It must then be determined whether there is evidence of a breach of that duty.

i. Defendants' duty

The resolution of the first part of this issue is complicated by the fact that neither Defendant Smith, Defendant Miller nor Defendant Shuey committed the abusive acts that are alleged in the complaint. Therefore, in order to establish the requisite duty, the plaintiff must show the existence of a "special relationship" between the individual defendants and herself.[13]

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[13]In support of their position that there is no special relationship between themselves and the plaintiff, the defendants point out that a teacher is not considered a "person responsible for the child's welfare," *see* 11 P.S. § 2203, and does not, therefore, fall within the purview of the Child Protective Services Law. *See Pennsylvania State Educ. Assoc. v. Department of Public Welfare*, 68 Pa. Cmwlth. 279, 449 A.2d 89 (1982). Thus, defendants Smith, Miller and Shuey were under no statutory duty to report suspected instances of sexual assault that occurred in the Bradford Area High School.

The Court is not persuaded that the failure of the State to impose a statutory duty, to mandatorily report suspected cases of child abuse perpetrated by school teachers, is controlling in this case. In ruling as it did in *Pennsylvania State Education*, the Commonwealth Court merely concluded that the Child Protective Services Law as intended to focus on and remedy abuse that occurred within the structure of a family or a family-like environment. Accordingly, the court observed that "the clear import of . . . [the statutory language] is that persons responsible for the child's welfare customarily provide such matters as housing, clothing, furnishings, income and medical care for children in their care." *Pennsylvania State Education*, 68 Pa. Cmnwlth. at 283, 449 A.2d at 92. Teachers do not serve those functions and are not, therefore, covered by the Act.

Notwithstanding the court's observation, regarding the noncustodial role of teachers, teachers and school administrators do stand in a special

The Supreme Court's opinion in *Martinez v. California*, 444 U.S. 277 (1980) opened the door to the concept that "duty" in a constitutional tort could be contingent on the finding of a special relationship. In *Martinez* a civil rights action was brought by the parents of a young woman who was murdered by a state parolee. Although the focus of the dismissal was on lack of causation--the murder did not occur until five months after the parole--the Supreme Court did imply that under a different set of circumstances, at least a duty might be imposed. *See Martinez*, 444 U.S. at 285.

Courts were quick to pick up on the Supreme Court's implications. Thus, in certain § 1983 cases the focus became the nature of the relationship between the plaintiff and the state actor.[14] *See, e.g., Estate of Bailey*, 768 F.2d at 510; (action brought by father against agency charged with protecting child from abusive family situations); *Fox v. Curtis*, 712 F.2d 84 (4th Cir. 1983); (action brought

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relationship with students. Children are required by law to attend school. *See* 24 P.S. § 13-1327. And authority over children who attend their schools. *See* 24 P.S. § 13-1317. Clearly, then there is a special relationship that exists among these parties.

[14]Interestingly, some courts have identified the "special relationship" as a relationship between the plaintiff and the third person who committed the wrongful act. For example, in *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983) it was noted: "the Court considered the fact that the plaintiffs' decedent did not stand in any special relationship to the parolee from which the parole officers might have inferred a special danger to her."

against state corrections employees who were charged with postrelease supervision of a parolee); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); Doe I, 649 F.2d 134 (action brought against state agency charged with overseeing foster care placements); *P.L.C.*, 568 F. Supp. 961 (action brought by female resident against Housing Authority).

The court's opinion in *Bowers v. DeVito* is worth additional consideration. That case was brought on behalf of a woman who was murdered by a person who had been recently released from a state mental facility. The offender had a seven year record of severe mental health problems and was known by the state actors to be extremely violent. In affirming the summary judgment order, entered on behalf of the State, the appellate court announced that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers*, 686 F.2d at 618. The court did go on to qualify that statement, however.

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm is clearer than it is. *If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.* It is on this theory that state prison personnel are sometimes held liable under §

> 1983 for the violence of one prison inmate against another.

Id. (emphasis added).

Returning to the instant action, it is clear that although the plaintiff was not within the custodial care of the defendants, she did spend a large part of her day in an environment where defendants had ultimate control. As principal, assistant principal and superintendent of the Bradford Area High School, the defendants possessed certain power and were cloaked with certain authority.[15] These defendants were charged with the duty of ensuring that the school environment was a safe one for students. Therefore, this Court concludes that a special relationship exits between the plaintiff and the individual defendants.

ii. Breach of duty

The next issue before this Court is whether the defendants have breached their duty to the plaintiff. The defendants assert that any professional decisions they made are presumptively correct and that liability could not attach

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[15] 24 P.S. § 13-1317 specifically provides:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his, school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

under such a circumstance. Accordingly, the defendants rely on the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

The issue in *Youngberg* involved the due process rights of an individual committed to a state institution for the mentally retarded. After holding that the plaintiff had certain due process rights, the Court went on to explain that those rights were not absolute. Rather, the Court advised, a balance must be reached between the rights of the individual and the day-to-day demands realized by the institution. In recognizing this balance, the Supreme Court adopted the position set forth by Chief Judge Seitz's in his concurring opinion.

Accordingly, the Supreme Court held:

> We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally, acceptable choices should have been made.'

Youngberg, 457 U.S. at 321.

The Supreme Court went on to hold that in deciding what is "reasonable" the courts must afford deference to the judgment of professionals. Thus:

> the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

The defendants in the instant action argue that since the plaintiff's claim of liability is based on policy decisions made by Shuey, Smith and Miller, i.e., failing to investigate Wright's background before hiring him and failing to detect and/or investigate students, complaints of abuse, *Youngberg* controls. "Neither this Court nor any jury is permitted to substitute its judgment for that of the professionals to whom these matters are properly delegated." *See* Defendants Brief Submitted in Companion Case at 24. Therefore, according to the defendants, the policy decisions are presumptively correct and the plaintiffs, basis for liability must fail.

The flaw in defendants, argument is that it fails to take into account the situation where a decision, though made by a professional, is a "substantial departure from accepted professional judgment, practice or standards." In such a

case the presumption of correctness is negated. The plaintiff must be afforded an opportunity to rebut the presumption of correctness.[16]

In opposition to the defendants, motion for summary judgment, the plaintiff submitted the affidavit of Dr. Chet C. Kent, Superintendent of Keystone Oaks School District, Pittsburgh, Pennsylvania. The affidavit states that the policies adopted by the defendants, for dealing with suspected cases of sexual assault or sexual harassment, deviated significantly from the norm. *See* Affidavit of Dr. Kent at 14, 18-22. Based on the affidavit of Dr. Kent, this Court concludes that there are genuine issues of material fact pertaining to the question of defendants, compliance with "accepted professional judgment, practice or standards."

iii. Applicable standard

The final inquiry pertaining to the liability of the individual defendants is the standard to be applied. In its recent decision of *Daniels v. Williams*, 474 U.S. 327, 106

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[16]As the Supreme Court noted in *Youngberg*:

> All members of the Court of Appeals agreed that respondents' [plaintiff's] expert testimony should have been admitted. . . . [W]e have no reason to disagree with the view that the evidence was admissible. It may be relevant to whether petitioners' [defendants'] decisions were a substantial departure from the requisite professional judgment.

Youngberg, 457 U.S. at 323.

S. Ct. 662 (1986), the Supreme Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 663. Thus, it has been held that more than mere negligence is needed to establish liability on the part of state actors.

Despite defendants, allegations that "the record is bare of any conduct of these defendants that even begins to approach the requisite standard," see Defendants, Brief Submitted in Companion Case at 21, this Court finds that the plaintiff has presented sufficient evidence to suggest that there is a genuine issue of material fact. In addition to the affidavit of Dr. Kent, there is evidence by which a jury could conclude that: (1) the defendants were reckless in their handling of the 1979 incident involving Judy Grove Sowers; (2) the defendants were reckless in their failure to investigate other reported incidents involving Mr. Wright and female students and (3) the defendants were reckless in their attempts to remedy and/or rectify the problems involving Mr. Wright. In light of this evidence this Court holds that the issue of liability is one for the jury to decide.[17]

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[17]The defendants also contend that there is no evidence that their acts were the cause of the injuries sustained by the plaintiff. Again, this Court concludes that this issue is one best left for, the jury. The deposition testimony suggests that the defendants handling of the incident involving Judy Sowers Grove provided Mr. Wright with additional ammunition with which to coerce and/or manipulate the plaintiff. *See* Deposition of Kathleen Stoneking at 225, 250-51 (September 12, 1986). *See also* Deposition of Kim Harbaugh at 409-16, 432-34; Deposition of Lisa Rovito at 173, 234.

b. Liability of the School District

The pivotal case in the area of municipal liability under § 1983 is *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Reversing its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court in *Monell* held that a municipal corporation is a person for purposes of § 1983. Therefore, a municipality may be liable for damages that arise out of a violation of a constitutional right. As determined by the Court in *Monell*, however, municipal liability is not without limits.

In addressing the exposure of municipal corporations to § 1983 liability, the *Monell* Court excluded liability based on principles of respondent superior. The Court noted: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor." *Monell*, 436 U.S. at 691. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

The Court in *Monell* did not delve into the differences between a "policy" and a "custom," but did point out that municipal liability could attach if either were established. Advisedly, the Court noted:

> although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" *even though such a custom has not, received formal approval through the body's official decision-making channels.*

Id. 690-91 (Emphasis added).

In recent cases the Supreme Court has expounded on the issue of "municipal liability." *See, e.g., Brandon v. Holt*, 469 U.S. 464 (1985); *City of Oklahoma City v. Tuttle*, 471 U.S. 791 (1985). The Court's holding in *Brandon* is particularly instructive.

Brandon was instituted by individuals who had been "viciously assaulted" by a Memphis City police officer; the action was filed against the director of the police department in his official capacity. In awarding the plaintiffs compensatory damages the district court concluded that the director of the department, although *without* actual knowledge, should have known that the police officer who perpetrated the attack had "dangerous propensities." Holding that the director was shielded from liability by the doctrine of qualified immunity, the appellate court reversed the district court's decision.

The Supreme Court was of a different opinion. The Court concluded that "judgment against a public servant, in his official capacity, imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Brandon*, 469 U.S. at 471-72. Thus, liability imposed on the Director of the City Police, in his official capacity, would result in liability on the part of the municipal entity.

Decided just a few months after *Brandon*, the Court's decision in *Tuttle* addresses a different aspect of municipal liability. In *Tuttle* the Court was called on to decide whether jury instructions in a "failure to adequately train" case comported with the applicable law. In reaching its decision that the charge did not comport with the law, the Court expounded on the requirement of an official custom or policy.

The Court attempted to distinguish the difference between a policy or custom that was itself unconstitutional and one that was not.[18] The Court set forth the following parameters.

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, uncon-

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[18]The Supreme Court expressly declined to rule on the issue of whether a policy that was not itself unconstitutional could ever meet the policy requirement of *Monell*. *Tuttle*, 471 U.S. at 804 n.7.

> stitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Read together, *Brandon* and *Tuttle* seem to suggest at least two conclusions. First, if a "municipal servant" is found to be liable, in his or her official capacity, for constitutional violations, then, the municipality will also be liable. Second, if a policy, practice or custom of a municipal entity is not itself unconstitutional, liability will only attach if there is proof of more than a single episode of a constitutional deprivation.

In the instant action, the plaintiff alleges that the School District, acting through Dr. Smith, Mr. Miller and Mr. Shuey, had a practice or custom of failing to take appropriate action with respect to teachers who posed a threat to the health, safety and welfare of female students. More specifically, the plaintiff alleges that the School District failed to investigate reports of sexual abuse and permitted teachers to remain in charge of extracurricular activities despite the knowledge that these teachers pre-

sented a danger to female participants. According to the plaintiff, the above mentioned practice or custom of the School District was the proximate cause of her injuries.

In order to determine whether the School District, acting through its agents, had a practice or custom that "caused" the plaintiff's injuries, such that municipal liability will attach, this Court must review the allegations and depositions. The first incident that purports to support the inference that the defendants had a practice or custom occurred in late 1977 or early 1978.[19]

According to the deposition testimony of Theresa Rodgers, she was sexually accosted by her social studies teacher, Rodgers, Richard DeMarte, in her senior year. Ms. Rodgers testified that she immediately reported this incident to Mr. Miller and Dr. Smith, whereupon she was warned that it was going to be her word against Mr. DeMarte's and that she should not go home and tell her parents about the assault. Ms. Rodgers further testified that the principal suggested that she stay away from Mr. DeMarte, if at all possible, and then counselled her that he would take care of it. Deposition of Theresa Rodgers at 113-14.

Despite Dr. Smith's assurance that "he would take care of it," Theresa Rodgers was never informed of any action taken against Mr. DeMarte. Mr. DeMarte's personnel file, maintained by the School District, conspicuously lacks any

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[19]*See* Deposition of Theresa Rodgers at 108.

record of disciplinary action taken against him during the pertinent time period. In fact, Dr. Smith gave Mr. DeMarte a perfect score on his teaching evaluation, remarkably, an evaluation that included assessment of "emotional stability," "social adjustment," "judgment" and "habits of conduct." *See* Plaintiff's Exhibit 4 filed in Companion Case.

Additionally, female students voiced complaints against Mr. DeMarte in January, 1981; March, 1981; November, 1982 and October, 1985.[20] Dr. Smith and Mr. Miller had direct notice of all these complaints. Mr. Shuey was informed of at least two of the above noted complaints. *See* Defendants, Second Supplemental Brief Submitted in Companion Case at 4. The personnel file of Mr. DeMarte is silent as to these incidents. Furthermore, it is not clear what, if any, disciplinary action was taken against the teacher. Significantly, Mr. DeMarte is still coaching the girls, tennis team.

The next critical series of events, upon which liability of the School District is based, occurred in the fall of 1979. At that time, Judy Grove, a high senior and member of the band, reported to Mr. Miller and Dr. Smith that the

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[20]As conveyed to the administration, Mr. DeMarte attempted to molest a young woman during Homecoming activities. Both Dr. Smith and Mr. Miller received notice of the complaint.

band director, Edward Wright, had sexually assaulted her.[21]

It will fall to a jury to ascertain the exact sequence of events that immediately preceded and followed Judy Grove's disclosure. A review of the deposition testimony of Frederick Smith, Richard Miller, Judy Grove, and her father, Hayward Grove, demonstrates a great divergence of views. However, for purposes of summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. Additionally, the Court must consider reasonable inferences that might be drawn in favor of the plaintiff. Since the testimony of Judy Grove is most favorable to the plaintiff, the Court will review that testimony in some detail.[22]

Although Ms. Grove's recollections, regarding specific dates and times, were somewhat vague, her deposition testimony was rather emphatic on other points. Judy Grove testified that she relayed the incident of the sexual

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[21]Mr. Miller testified that, prior to talking co Judy, he had received a phone call from Mr. Wright informing him about the "rumors" involving Ms. Grove. Apparently, Mr. Wright was seeking advise on how to quiet the rumors. *See* Deposition of Mr. Miller at 55-56.

[22]Despite defendants, characterization of Ms. Grove's testimony, as "ridiculous," "preposterous" and "incredible," *see* Defendants Supplemental Brief Submitted in Companion Case at 4, 9, the Court accepts the testimony as plausible.

assault to both Mr. Miller and Dr. Smith.[23] According to her testimony, Dr. Smith implied that in light of the circumstances--Judy had been drinking on the evening of the assault--she was responsible for the assault. Dr. Smith warned that she would not look good if the facts got out. Judy reports that she was frightened and felt as though she was receiving no support from the Administrators. It was only after being threatened with public disclosure and personal humiliation that Judy retracted, in a rather flippant fashion, that the assault had occurred.[24]

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[23]Mr. Shuey was apprised of the incident involving Judy Grove and Edward Wright by both Mr. Miller and Dr. Smith. *See* Deposition of Mr. Shuey at 17-22.

[24]Q: He, [Dr. Smith] told you it was your fault, or is that the impression you had?

A: No. He said it was my fault. That's why he wanted to clear up the rumors because he wanted the band to get back on their feet again.

Q: Did you tell him during that conversation that the rumors were not correct?

A: He had told me that if the rumors were true I would be--I could find myself in front of a jury, in front of a judge, telling exactly what happened, that being that I had been drinking [and that I was] at his house voluntarily, I would look like--I wouldn't look very good, is what he said. At that point I said, "Forget it. It's not true."

Q: So whatever the reason, you did tell Dr. Smith that these rumors were not true--

A: He told me that my parents would be called; he would call my father down and my mother right then. I said, "Forget it. I don't want to go through with it." You know. "Just forget it.". . . . " If I have to go through all of this they're not true."

Sometime after these initial meetings, Judy's father requested a conference. Prior to inviting Judy into the conference, Mr. Miller and Dr. Smith talked with Mr. Grove. Mr. Grove testified that an effort was made to convince him that no teacher would behave in the fashion alleged by Judy. *See* Deposition of Hayward Grove at 36, 41. Although when Mr. Grove entered the meeting he was confident that his daughter's version of the facts were true, he admitted to being less certain after conferring with these Administrators. *Id.*[25]

One of the topics of discussion at the above mentioned conference was whether Judy would be able to remain in the band. As perceived by both Judy and her father she had a choice: recant her story in front of the assembled band or withdraw from all band activities. *See* Deposition

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Deposition of Judy Grove at 46-47 (September 12, 1986).

[25]Another critical fact relates to Judy's deliberate attempt to seek help from Gene Dillard, an independent alcohol and drug counsellor. Mr. Dillard spent time at the Bradford Area High School in September, 1979. At the conclusion of all group informational sessions, Mr. Dillard invited students to talk with him individually. Judy Grove seized that opportunity and confided in Mr. Dillard.

As set forth in his deposition testimony, Judy told Mr. Dillard that she had been sexually assaulted by Mr. Wright. With the express consent of Judy, this information was directly relayed to Dr. Smith and Mr. Miller. Mr. Dillard offered his opinion that other students had probable been subject to Wright's abuses. The Administrators assured Mr. Dillard that the matter would be taken care of.

of Judy Grove at 59-60, 68; Deposition of Hayward Grove at 44, 47, 49. As recalled by Judy, the suggestion to appear before the band and dispel the "rumors," about Mr. Wright, originated with Dr. Smith. *See* Deposition of Judy Grove at 74 (September 12, 1986).

In early January, 1980, Dr. Smith assembled all the band members.[26] He proceeded to acknowledge that rumors had been circulating and that a certain student would address those rumors. The floor was turned over to Judy. As recalled by Judy, pressed with questions by her peers, she fled the room in tears. It is not clear whether an apology was ever actually offered.

The episode of the forced apology has special significance in light of the assaultive conduct that occurred between Edward Wright and Kathleen Stoneking. Apparently, the "forced apology" served as a trump card in the hands of Edward Wright. When a student would threaten to disclose the abuse, Wright quickly reminded his victim about the "Judy Grove incident." His message was clear and convincing: "No one believed Judy Grove, why would anyone believe you." *See infra* Note 17. His tactical threat proved to be quite effective at least for a period of time.

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[26]At, or about the same time, Dr. Smith directed Mr. Wright to cease all one-on-one contact with female students. The enforcement of this directive was left solely up to Mr. Wright.

In reviewing the above events, for the purpose of evaluating the liability of the School District, this Court need not decide whether the School District had a practice or custom, of dealing with complaints of sexual abuse or harassment, which "caused" the plaintiff's injuries. Nor is it for this Court to determine whether Dr. Smith, Mr. Miller and Mr. Shuey are liable in their official capacities, such that liability could be imputed to the School District. *See Brandon*. 469 U.S. 464. Rather, this Court is charged with the task of evaluating the record evidence and determining whether genuine issues of material facts exist. The ultimate issue of liability is one with which the jury must wrestle.

For the purposes of this motion, the Court concludes that there is sufficient evidence from which a jury could infer the existence of a practice or custom. Additionally, it could be inferred from the evidence that the School District was responsible for the practice or custom and that the practice or custom caused the plaintiff's injuries. Thus, the defendants, motion, as it pertains to the liability of the School District, must be denied.

C. Qualified Immunity

The standard to be applied in resolving a qualified immunity issue is well-settled. In *Harlow v. Fitzgerald*, 457 U.S. 800, (1982), the Supreme Court revised the qualified immunity standard and held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct

does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known." *Id.* at 818. Thus, the pending question, in terms of the qualified immunity defense, is whether the plaintiff had a constitutional right which at the time of the alleged violation, was clearly established.

As the Court concluded in Section IV B (1) of this opinion, the plaintiff has alleged a viable claim of a constitutional violation. According to the Court's conclusion, there is a special relationship that existed between the plaintiff and the individual defendants. As a result of this relationship defendants had a duty to provide a reasonably safe environment for the plaintiff. There is nothing new or novel about this constitutional right or this duty. *See. e.g., Ingraham v. Wright*, 430 U.S. 651 (1977); *Martinez v. California*, 444 U.S. 277 (1980); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980); Doe I, 649 F.2d 134 (2d Cir. 1981); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983).

This Court concludes that a reasonable person would have been aware that the plaintiff had a substantive due process right to be free from intrusions into her "personal privacy and bodily integrity." As the court in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) so aptly stated:

> [t]he existence of this right to ultimate bodily security--the most fundamental aspect of personal privacy--is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substan-

> tive due process. Numerous cases in a variety of contexts recognize it as the last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible. Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school teachers.

Id. at 613. Thus, defendants are not entitled to qualified immunity.

D. Pendent State Claims

Since the Court denied the defendant's motion for summary judgment, as it pertained to the plaintiff's § 1983 claims, this Court retains subject matter jurisdiction over the pendent state claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The only remaining question is whether the complaint sets forth state law claims. The plaintiff's complaint does not identify a specific state law cause of action;[27] the pleadings are not sufficient to give notice of the claim alleged. Thus, this Court concludes that the motion for summary judgment, as it pertains to the state law claims set forth in Counts II, IV and VI, is granted.

An appropriate order shall be issued.

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[27]Reference in the complaint to 42 Pa. C.S.A. § 8550 appears to be offered only as a means of demonstrating that the doctrine of "official immunity" may fail to shield these defendants from suit.

In part, 42 Pa. C.S.A. § 8550 provides:

> In any action against a local agency or employee thereof nor damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of the sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

ORDER

MENCER, J.

AND NOW, this 28th day of August, 1987, for the reasons set forth in the accompanying Opinion,

IT IS HEREBY ORDERED that:

(1) the Motion for Summary Judgment, filed on behalf of the Defendants, Bradford Area School District, Frederick Smith, Richard Miller and Frederick Shuey, is DENIED as the Motion relates to Counts I, III, V and VII of the Complaint;

(2) the Motion for Summary Judgment, filed on behalf of the defendants, is GRANTED as it pertains to Counts II, IV and VI of the Complaint.

Judgment is entered in favor of the Defendants and against the Plaintiff, Kathleen Stoneking, on Count II, Count IV and Count VI of the Complaint.

IT IS FURTHER ORDERED that the Defendants shall file a Pretrial Narrative Statement by September 18, 1987. The trial, scheduled for September 8, 1987, is continued. A Pretrial Conference shall be held on Wednesday, October 7, 1987, at 4:00 pm in Room 310, United States Courthouse, Erie, Pennsylvania.

E. Order, Denial of Defendants' Petition to Appeal Issue of Statute of Limitations, U.S. Court of Appeals for Third Circuit, No. 87-8061, October 21, 1987

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-8061

KATHLEEN STONEKING, Appellee
vs
BRADFORD AREA SCHOOL DISTRICT, etc., et al.
(W.D. D.C. Civil No. 87-63 E)

Present: SLOVITER and BECKER, Circuit Judges.

Petition for permission to appeal,

Brief in opposition to appellants' petition for permission to appeal,

/s/Marta Sanchez
Deputy Clerk 7-3080

Defendants' petition for permission to appeal the district court's ruling on the statute of limitations question is denied.

For the Court,

/s/Dolores K. Sloviter

Dated: October 21, 1987

F. Complaint, Stoneking vs Bradford Area School District, et. al., No. 87-63 E, March 24, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KATHLEEN STONEKING,
Plaintiff

vs. Civil Action No. 87-63E

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,
Defendants

COMPLAINT

Parties and Jurisdiction

1. The Plaintiff, Kathleen Stoneking (hereinafter Plaintiff), is a citizen of the Commonwealth of Pennsylvania and resides in Indiana, Pennsylvania.

2. The Defendant, Bradford Area School District, (hereinafter the School District), is a citizen of the Com-

monwealth of Pennsylvania, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania with its principal offices located at 50 Congress Street, Bradford, Pennsylvania.

3. The Defendant, Frederick Smith (hereinafter Smith), is a citizen of the Commonwealth of Pennsylvania residing in Bradford, Pennsylvania who is and was at all material times the Principal of the Bradford Area High School.

4. The Defendant, Richard Miller (hereinafter Miller) is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, who was at all material times the Assistant Principal of the Bradford Area High School.

5. The Defendant, Frederick Shuey (hereinafter Shuey), is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, was at all material times the Superintendent of the School District.

6. This action arises under Title 42 of the United States Code, Section 1983 and this Court has jurisdiction of this action pursuant to Title 28 of the United States Code, Sections 1331 and 1343.

FACTS

7. In 1976 the School District hired Edward Wright (hereinafter Wright) to serve as Band Director.

8. In his capacity as Band Director, Wright was vested with broad responsibility for conducting and manag-

ing the band and music programs of the School District including the selection of student participants, and scheduling and conducting of band competitions and periodic music rehearsals throughout the school year.

9. At all material times, Wright conducted the aforesaid activities with the knowledge, consent and approval of the Defendants.

10. During Wright's tenure as Band Director, the School District's music program greatly improved and the Bradford Area High School Band won numerous competitions as a result of which Wright enjoyed the strong support and backing of the School District and its officials.

11. In 1979, a female member of the Bradford Area High School Band informed Defendant Smith, in his capacity as Principal, that Wright had attempted to rape and/or sexually assault her.

12. The Defendant Smith failed to conduct an investigation into the allegations or report the same to appropriate authorities and required the female student to issue a public apology to Wright and retract her allegations in front of the assembled Bradford Area High School Band.

13. It is believed and therefore averred that subsequent to 1979 and thereafter, the Defendant Smith, in his capacity as Principal of Bradford Area High School began to maintain a personal file on Wright which contained, inter alia, reports of complaints and/or allegations concerning sexual misconduct, abuse, and/or harassment by Wright of female students participating in the band program.

14. After that time Smith, in his capacity as Principal, met with Wright and instructed him that he was to have no further "one on one" contact with female band members.

15. It is believed that therefore averred that said policy of Smith relative to Wright's contact with female students was reduced to writing and placed in Wright's file maintained by Smith and described more fully above.

16. Despite the institution of the aforesaid policy concerning Wright and complaints received concerning Wright prior thereto, Smith, Miller and Shuey failed to take any action to protect the health, safety and welfare of the female student body in general and the Plaintiff in particular such as further investigation, suspension or discipline of Wright, monitoring of Wright's activities, or the reporting of said allegations to appropriate officials for further investigation.

17. It is believed and therefore averred that Defendant Smith had actual notice of the conduct of Wright or, in the alternative, should have known but for the inherently defective and deficient policies and customs promulgated, developed and encouraged by Smith discussed more fully below.

18. During this time Miller, in his capacity as Assistant Principal, was on actual notice of the various allegations and complaints concerning sexual misconduct by Wright since 1979 described more fully above and in particular was on actual notice of the policy adopted by Defendant Smith whereby Smith informed Wright he was

to have no further "one on one" contact with female band members.

19. It is believed and therefore averred that Defendant Shuey, in his capacity as Superintendent of the School District, was on actual notice of the various allegations and complaints concerning sexual misconduct by Wright since 1979 described more fully above and, in particular, was on actual notice of the policy adopted by Defendant Smith whereby Smith informed Wright he was to have no further "one on one" contact with female band members.

20. In the alternative, in the event that Defendant Shuey was not on actual notice of the aforesaid allegations and complaints concerning Wright since 1979, his failure to be so informed was the result of inherently defective and deficient policies and customs of the School District which were promulgated, developed and encouraged by Defendant Shuey.

21. The Plaintiff participated in the Bradford Area High School Band during her sophomore, junior and senior years and graduated in 1983, although remaining closely involved with the band.

22. In or about October of 1980 and continuing thereafter periodically until May of 1985, Wright did through physical force, threats of reprisal, intimidation and coercion sexually abuse and harass the Plaintiff and force her to engage in various sexual acts with him.

23. The periodic sexual abuse of the Plaintiff by Wright occurred at various places including the Bradford

Area High School band room and its environs, Wright's vehicle, Wright's house and on trips and band functions.

24. Wright's modus operandi which he employed with the Plaintiff and it is believed and therefore averred with various other female members of the Bradford Area High School Band was to threaten the loss of parental support, the esteem of friends, and the dissolution of the Bradford Area High School Band which had become such a significant institution of the School District and the community in general if his actions were reported.

25. In early March of 1986, a clinical psychologist in State College, Pennsylvania contacted the Bradford Police Department and Defendants Shuey and Smith as a result of a complaint of sexual abuse involving a female band member reported to the psychologist by the student's parents.

26. On March 14, 1986, Wright's resignation was unanimously accepted by the Bradford Area School Directors and he was charged by the police with numerous criminal offenses, all sexual in nature.

27. It was at this point in time, to-wit, in or about March, 1986, the Plaintiff first became aware of the facts establishing the complicity of Defendants Smith, Shuey and Miller and therefore Defendant School District, in allowing the aforesaid sexual molestation to continue.

COUNT I.

Kathleen Stoneking vs. Frederick Smith

28. Paragraphs 1 through 27 are incorporated herein by reference as if fully set forth.

29. At all material times, a special custodial relationship existed between the Plaintiff and the Defendant Smith.

30. The Plaintiff has been deprived by Defendant Smith, while acting under color of state law, of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from threats, intimidation and sexual abuse such as that perpetration by Wright.

31. The acts and omissions of Defendant Smith represent conduct which was intentional, willful, outrageous, reckless and deliberately indifferent to the health, safety and welfare of the female student body of the Bradford Area High School in general and Plaintiff in particular.

32. Said acts and omissions included:

(A) Failing to report pursuant to the requirements of the Child Protective Services Law, 11 P.S. Section 2201, et seq., the various incidents of suspected sexual abuse of female band members by Wright of which Defendant Smith had been on actual notice since 1979;

(B) Failing to adopt an effective policy or policies to facilitate the discovery of sexual abuse of female stu-

dents and the prompt reporting thereof to appropriate authorities;

(C) Failing to properly and vigorously investigate various reports of sexual abuse of female band members by Wright;

(D) Concealing from the parents of the female band members of the Bradford Area High School and various other public officials including the police department, the various complaints and accusations which had been made against Wright since 1979 and, in particular, in failing to disclose to the appropriate officials the contents of the private file which Defendant Smith kept on Wright relative to said complaints;

(E) Continuing to permit Wright to function as Band Director despite the fact that Smith was on actual notice that Wright posed a significant threat to female band members and would have the occasion and opportunity by virtue of his position as Band Director to sexually abuse them;

(F) Encouraging and perpetuating the development of a custom or course of conduct at the Bradford Area High School whereby allegations of sexual abuse or mistreatment by Wright and other teachers were not investigated and reported.

33. As a proximate result of the aforesaid acts and omissions of Defendant Smith, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in the future from the effects of severe psychological trauma

including severe depression, loss of self esteem, mental anguish, embarrassment and humiliation.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against Defendant, Frederick Smith, in an amount in excess of $10,000.00 plus punitive damages, costs of suit and attorney's fees pursuant to Title 40 U.S.C. Section 1988.

COUNT II

Kathleen Stoneking v. Frederick Smith

34. The averments of paragraphs 1 through 33 are incorporated herein by reference as if fully set forth.

35. The acts and omissions of the Defendant Smith represent malicious and willful misconduct within the meaning of 42 C.S.A. Section 8550.

36. As a proximate result of the aforesaid acts and omissions of Defendant Smith, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in the future from sever psychological trauma including severe depression, loss of self esteem, mental anguish, embarrassment, humiliation and headaches.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Defendant, Frederick Smith, in an amount in excess of $10,000.00 plus punitive damages, costs and suit and such other relief as the Court may deem appropriate.

COUNT III.

Kathleen Stoneking vs. Richard Miller

37. Paragraphs 1 through 36 are incorporated herein by reference as if fully set forth.

38. At all material times, a special custodial relationship existed between the Plaintiff and the Defendant Miller.

39. The Plaintiff has been deprived by Defendant Miller, while acting under color of state law, of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from threats, intimidation and sexual abuse such as that perpetrated by Wright.

40. The acts and omissions of Defendant Miller represent conduct which was intentional, willful, outrageous, reckless and deliberately indifferent to the health, safety and welfare of the female student body of the Bradford Area High School in general and the Plaintiff in particular.

41. Said acts and omissions included:

(A) Failing to report pursuant to the requirements of the Child Protective Services Law, 11 P.S. Section 2201, et seq., the various incidents of suspected sexual abuse of female band members by Wright of which Defendant Miller had been on actual notice since 1979;

(B) Failing to adopt an effective policy or policies to facilitate the discovery of sexual abuse of female stu-

dents and the prompt reporting thereof to appropriate authorities;

(C) Failing to properly and vigorously investigate various reports of sexual abuse of female band members by Wright;

(D) Concealing from the parents of the female band members of the Bradford Area High School and various other officials including the police department the various complaints and accusations which had been made against Wright since 1979 and, in particular, in failing to disclose to the appropriate officials the contents of the private file which Defendant Smith kept on Wright relative to said complaints;

(E) Continuing to permit Wright to function as Band Director despite the fact that Miller was on actual notice that Wright posed a significant threat to female band members and would have the occasion and opportunity by virtue of his position as Band Director to sexually abuse them;

(F) Encouraging and perpetuating the development of a custom or course of conduct at the Bradford Area High School whereby allegations of sexual abuse or mistreatment by Wright were not vigorously investigated and reported.2

42. As a proximate result of the aforesaid acts and omissions of Defendant Miller, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in the future from the effects of severe psychological trauma

including severe depression, loss of self esteem, mental anguish, embarrassment and humiliation.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Defendant, Frederick Miller, in an amount in excess of $10,000.00 plus punitive damages, costs of suit and attorney's fees pursuant to Title 42. U.S.C. Section 1988.

COUNT IV.

Kathleen Stoneking vs. Richard Miller

43. The averments of paragraphs 1 through 42 are incorporated herein by reference as if fully set forth.

44. The acts and omissions of the Defendant Miller represent malicious and willful misconduct within the meaning of 42 Pa. C.S.A. Section 8550.

45. As a proximate result of the aforesaid acts and omissions of Defendant Miller, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in the future from the effects of severe psychological trauma including severe depression, loss of self esteem, mental anguish, embarrassment and humiliation.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Defendant, Richard Miller, in an amount in excess of $10,000.00 plus punitive damages, costs or suit and such other relief as the Court may deem appropriate.

COUNT V.

Kathleen Stoneking v. Frederick Shuey

46. The averments of paragraphs 1 through 45 are incorporated herein by reference as if fully set forth.

47. At all material times, a special custodial relationship existed between the Plaintiff and the Defendant, Shuey, as Superintendent of the School District.

48. The Plaintiff has been deprived by Defendant Shuey, whole acting under color of state law, of her rights privileged and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from threats, intimidation and sexual abuse such as that perpetrated by Wright.

49. The acts and omissions of Defendant Shuey represent conduct which was intentional, willful, outrageous, reckless and deliberately indifferent to the health, safety and welfare of the female student body of the Bradford Area High School in general and the Plaintiff in particular.

50. Said acts and omissions included:

(A) Failing to report pursuant to the requirements of the Child Protective Service Law, 11 P.S. Section 2201, et seq., the various incidents of suspected sexual abuse of female band members by Wright of which Defendant Shuey had been on actual notice since 1979;

(B) Failing to adopt an effective policy or policies to facilitate the discovery of sexual abuse of female stu-

dents and the prompt reporting thereof to appropriate authorities;

(C) Failing to properly and vigorously investigate various reports of sexual abuse of female band members by Wright;

(D) Concealing from the parents of the female band members of the Bradford Area High School and various other officials including the police department the various complaints and accusations which had been made against Wright since 1979 and, in particular, in failing to disclose to the appropriate officials the contents of the private file which Defendant Smith kept on Wright relative to said complaints;

(E) Continuing to permit Wright to function as Band Director despite the fact that Miller was on actual notice that Wright posed a significant threat to female band members and would have the occasion and opportunity by virtue of his position as Band Director to sexually abuse them;

(F) Encouraging and perpetuating the development of a custom or course of conduct at the Bradford Area High School whereby allegations of sexual abuse or mistreatment by Wright were not vigorously investigated and reported.

51. In the alternative, in the event that Defendant Shuey did not have actual notice of the complaints and allegations concerning sexual abuse of female band members by Wright since 1979, the failure to have acquired such information was the result of inherently defective and

deficient policies promulgated by Defendant Shuey or a course of conduct or custom perpetuated and encouraged by him which frustrated the efficient reporting of suspected child abuse and prompt investigation of the same.

52. As a proximate result of the aforesaid acts and omissions of Defendant Shuey, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in the future from the effects of severe psychological trauma including severe depression, loss of self esteem, mental anguish, embarrassment and humiliation.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Defendant Frederick Shuey, in an amount in excess of $10,000.00 plus punitive damages, costs of suit and attorney's fees pursuant to Title 42 U.S.C. Section 1988.

COUNT VI.

Kathleen Stoneking vs. Frederick Shuey

53. The averments of paragraphs 1 through 52 are incorporated herein by reference as if fully set forth.

54. The acts and omissions of the Defendant Shuey represent malicious and willful misconduct within the meaning of 42 C.S.A. Section 8550.

55. As a proximate result of the aforesaid acts and omissions of Defendant Shuey, the Plaintiff was subjected to sexual abuse, harassment, threats and intimidation by Wright and has suffered and will continue to suffer in

the future from the effects of severe psychological trauma including severe depression, loss of self esteem, mental anguish, embarrassment, humiliation, headaches and stomach disorders.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Defendant, Frederick Shuey, in an amount in excess of $10,000.00 plus punitive damages, costs of suit and such other relief as the Court may deem appropriate.

COUNT VII.

Kathleen Stoneking vs. Bradford Area School District

56. The averments of paragraphs 1 through 55 are incorporated herein by reference as if fully set forth.

57. The Defendant School District is directly liable to the Plaintiff by virtue of the aforesaid acts and omissions of Defendants Smith, Miller and Shuey in their official capacities as Principal, Assistant Principal and Superintendent respectively, and further as a result of the deficient and defective policies and customs promulgated, developed and encourage by said Defendants.

WHEREFORE, the Plaintiff, Kathleen Stoneking, requests compensatory damages against the Bradford Area School District in an amount in excess of $10,000.00, plus

punitive damages, costs and suit and attorney's fees pursuant to Title 42 U.S.C. Section 1988.
JURY TRIAL DEMANDED.

PECORA, DUKE & BABCOX

BY:_____

P.O. Box 548
Bradford, PA 16701
(814) 362-3896

G. Answer to Complaint, Stoneking vs Bradford Area School District, et. al., No. 87-63 E, June 23, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KATHLEEN STONEKING,
Plaintiff

vs. Civil Action No. 87-63E

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,
Defendants

ANSWER TO COMPLAINT OF KATHLEEN STONEKING

Now Come Defendants, by and through their attorneys Murphy, Taylor & Adams, P.C. and James D. McDonald, Jr., Esq., and answer the Complaint of the Plaintiff, Kathleen Stoneking, setting forth as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted. In further answer, the Defendant Frederick Shuey retired from the said position on or about July 1, 1986.

6. Admitted that Plaintiff is attempting to establish a claim pursuant to the quoted statute; denied that any of the Defendants have violated the said statute. Admitted that this Court has jurisdiction to resolve the instant controversy.

7. Admitted.

8. The allegations of Paragraph 8 are admitted in part and denied in part. It is admitted that Wright was band director and as band director he conducted the Bradford Area High School marching band, stage band and concert band. If is further admitted that Wright's duties a band director included summer band practice and conducting the Bradford Area High School bands during competitions. In other respects, the allegations of Paragraph 8 are denied.

9. The allegations of Paragraph 9 are admitted in part and denied in part. It is admitted that Wright conducted the activities set forth in Paragraph 8 of this Answer hereinabove with the knowledge, consent and approval of the Defendants. However, the responsibilities of Wright as band director set forth in Paragraph 8 of the Complaint are inaccurate and, therefore, the allegations of Paragraph 9 of the Plaintiff's Complaint referring thereto are denied as stated.

10. The allegations of Paragraph 10 of the Plaintiff's Complaint are admitted in part and denied in part. It is admitted that the marching band was developed during the period of time that Wright was employed by the Defendant Bradford and that the marching band did well in competition. It is specifically denied that the stage and concert bands did well in competition. It is admitted that the bands were supported by the School District and its officials to the same extent as the support provided to all School District activities. In all other respects, the allegations of Paragraph 9 of the Plaintiff's Complaint are denied.

11. The allegations of Paragraph 11 of the Plaintiff's Complaint are specifically denied as stated. It is admitted that Defendant Smith questioned a female member of the Bradford Area High School band regarding a possible relationship between her and Wright. The student denied the relationship and advised Defendant Smith that she had fabricated the story. In all other respects the allegations of Paragraph 11 are specifically denied.

12. The allegations of Paragraph 12 are specifically denied.

13. The allegations of Paragraph 13 are specifically denied. However, in further answer thereto, it is admitted that Defendant Smith did maintain a miscellaneous file organized chronologically which contained his notions relating to various subject matter expressed and/or raised by various persons over the years.

14. Denied as vague; Defendants are unclear as to what time Plaintiff is referring. In further answer, it is admitted that on or about December 15, 1984, Defendant Smith directed Wright not to place himself in a one-on-one situation at any time in the future with a female student. In other respects, the allegations of Paragraph 14 are denied.

15. In answer to Paragraph 15, it is admitted that the directive from Smith to Wright in 1984 was noted in writing on records maintained by Smith which records were placed in the miscellaneous file maintained by Smith. In other respects, the allegations of Paragraph 15 are denied.

16. The allegations of Paragraph 16 are specifically denied.

17. The allegations of Paragraph 17 are specifically denied.

18. The allegations of Paragraph 18 are specifically denied.

19. The allegations of Paragraph 19 are admitted in part and denied in part. It is admitted that Defendant Shuey was advised in a timely fashion of the activities conducted by Defendant Smith with respect to Wright. In other respects, the allegations of Paragraph 19 are denied.

20. The allegations of Paragraph 20 are specifically denied.

21. It is admitted that the Plaintiff participated in the Bradford Area High School band during her sophomo-

re, junior and senior years and that the Plaintiff graduated in 1983. Defendants are without sufficient knowledge or information to form a belief as to the remaining allegations about her involvement with the band subsequent to graduation, and those allegations are therefore denied, strict proof demanded at trial, if material.

22. Defendants are without sufficient knowledge or information to form a belief as to the allegations of Paragraph 22 of the Plaintiff's Complaint and therefore deny same and demand strict proof thereof at trial, if material. In further answer, Plaintiff never reported any such incidents to Defendants while she was a student in the high school.

23. In answer to Paragraph 23 of the Plaintiff's Complaint, the Defendants herein are without sufficient knowledge or information to form a belief as to the truth of those allegations and therefore deny same and demand strict proof thereof at trial, if material.

24. In answer to Paragraph 24 of the Plaintiff's Complaint, the Defendants are without sufficient knowledge or information to form a belief as to the truth of said allegations and therefore deny same and demand strict proof thereof at trial, if material.

25. In answer to Paragraph 25 of the Plaintiff's Complaint, it is specifically denied that clinical psychologists contacted Defendants Shuey and Smith. In all other respects, the allegations of Paragraph 25 are denied.

26. In answer to Paragraph 26 of the Plaintiff's Complaint, it is admitted that on March 14, 1987, Wright's

resignation was unconditionally accepted by Defendant Bradford.

27. The allegations of Paragraph 27 are specifically denied. It is specifically denied that any Defendant ever allowed any sexual molestation to take place.

28. Paragraphs 1 through 27 of this Answer hereinabove are incorporated herein by reference.

29. The allegations of Paragraph 29 are admitted in part. It is admitted that Defendant Smith, as principal, maintained a principal/student relationship with the students in the school system; denied that this is recognized legally as a "special custodial relationship." In other respects, the allegations of Paragraph 29 of the Plaintiff's Complaint are denied.

30. The allegations of Paragraph 30 are specifically denied.

31. The allegations of Paragraph 31 are specifically denied.

32. The allegations of Paragraph 32 of the Plaintiff's Complaint, specifically including all subparts thereof, are specifically denied.

33. The allegations of Paragraph 33 are specifically denied.

34. Paragraphs 1 through 33 of this Answer set forth hereinabove are incorporated herein by reference.

35. The allegations of Paragraph 35 are specifically denied.

36. The allegations of Paragraph 36 are specifically denied.

37. Paragraphs 1 through 36 of this Answer hereinabove are incorporated herein by reference.

38. The allegations of Paragraph 38 are admitted in part and denied in part. It is admitted that Defendant Miller maintained an assistant principal/student relationship between himself and the students of the Defendant School District; denied that this is a recognized legally as a "special custodial relationship." However, in all other respects, the allegations of Paragraph 38 of the Plaintiff's Complaint are specifically denied.

39. The allegations of Paragraph 39 are specifically denied.

40. The allegations of Paragraph 40 are specifically denied.

41. The allegations of Paragraph 41 of the Plaintiff's Complaint, specifically including all subparts thereof, are specifically denied.

42. The allegations of Paragraph 42 are specifically denied.

43. Paragraphs 1 through 42 of this Answer hereinabove are incorporated herein by reference.

44. The allegations of Paragraph 44 are specifically denied.

45. The allegations of Paragraph 45 are specifically denied.

46. Paragraphs 1 through 45 of this Answer hereinabove are incorporated herein by reference.

47. The allegations of Paragraph 47 are admitted in part and denied in part. It is admitted that Defendant Shuey maintained a superintendent/student relationship between himself and the students of the Defendant School District; denied that this is recognized legally as a "special custodial relationship." However, in all other respects, the allegations of Paragraph 47 of the Plaintiff's Complaint are specifically denied.

48. The allegations of Paragraph 48 are specifically denied.

49. The allegations of Paragraph 49 are specifically denied.

50. The allegations of Paragraph 50 of the Plaintiff's Complaint, specifically including all subparts thereof, are specifically denied.

51. The allegations of Paragraph 51 are specifically denied.

52. The allegations of Paragraph 52 are specifically denied.

53. Paragraphs 1 through 52 of this Answer hereinabove are incorporated herein by reference.

54. The allegations of Paragraph 54 are specifically denied.

55. The allegations of Paragraph 55 are specifically denied.

56. Paragraphs 1 through 55 of this Answer hereinabove are incorporated herein by reference.

57. The allegations of Paragraph 57 are specifically denied.

SECOND DEFENSE

58. The claims asserted by the Plaintiff in the within action are barred in whole or in part by the applicable statute of limitations.

THIRD DEFENSE

59. The Plaintiff has failed to state a claim upon which relief can be granted.

FOURTH DEFENSE

60. The Defendant, Bradford Area School District, is not vicariously liable to the Plaintiff under any theory of respondeat superior, since 42 U.S.C. §1983 does not support an action for vicarious liability.

FIFTH DEFENSE

61. The Defendant, Bradford Area School District, is not liable to the Plaintiff for punitive damages, since 42 U.S.C. §1983 does not support an action for punitive damages against a municipal body.

SIXTH DEFENSE

62. All Defendants, acting in their official capacity, reasonably believe that all actions taken by them were appropriate and constitutional in light of all the circumstances, and acted in good faith.

63. All Defendants are therefore immune from suit under 42 U.S.C. §1983.

SEVENTH DEFENSE

64. The Defendant, Bradford Area School District, is immune from suit under the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541.

65. The Defendants, Frederick Shuey and Frederick Smith, are immune from suit under the doctrine of official immunity, pursuant to 42 Pa. C.S.A. §8545.

EIGHTH DEFENSE

66. Plaintiff was contributorily negligent in that she did not report the incidents of which she complained in a timely fashion to the appropriate officials in order to allow them to take appropriate steps.

WHEREFORE, Defendants pray for a judgment in their favor and against Plaintiff, with costs and attorney fees assessed against Plaintiff.

MURPHY, TAYLOR & ADAMS, P.C.

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H. 24 Pa.C.S.A. §13-1317

§13-1317. Authority of teachers, vice principals and principals over pupils

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

As amended 1963, July 25, P.L. 315, § 1.

I. 24 Pa.C.S.A. §13-1327(a)

§13-1327. Compulsory school attendance

(a) Except as hereinafter provided, every child of compulsory school age having a legal residence in this Commonwealth, as provided in this article, and every migratory child of compulsory school age, is required to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language. In lieu of such school attendance, any child fifteen years of age with the approval of the district superintendent and the approval of the Secretary of Education, and any child sixteen years of age with the approval of the district superintendent of schools, may enroll as a day student in a private trade school or in a private business school licensed by the Department of Education, or in a trade or business school, or department operated by a local school district or districts. Such modified program offered in a public school must meet the standards prescribed by the State Board of Education or the State Board for Vocational Education. Except as hereinafter provided, every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language. Such parent, guardian, or other person having control or charge of any child or children, fifteen or sixteen years of age, in accordance with the provisions of this act, may send such child or children to a private trade school or private business school licensed by the Department of Education, or to a trade or business school, or department operated by a local school district or districts. Such modified program offered in a public school must meet the standards prescribed by

the State Board of Education or the State Board for Vocational Education. Such child or children shall attend such school continuously through the entire term, during which the public schools in their respective districts shall be in session, or in cases of children of migrant laborers during the time the schools are in session in the districts in which such children are temporarily domiciled. The financial responsibility for the education of such children of migrant laborers are temporarily domiciled; except in the case of special schools or classes conducted by an intermediate unit and approved by the Department of Education or conducted by the Department of Education. The certificate of any principal or teacher of a private school, or of any institution for the education of children, in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language, setting forth that the work of said school is in compliance with the provisions of this act, shall be sufficient and satisfactory evidence thereof. Regular daily instruction in the English language, for the time herein required, by a properly qualified private tutor, shall be considered as complying with the provisions of this section, if such instruction is satisfactory to the property district superintendent of schools.

No. 88-802

FILED
DEC 12 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Petitioners,

vs.

KATHLEEN STONEKING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether school administrators who know of and consciously disregard allegations that a particular teacher has sexually assaulted his students are entitled to qualified immunity where their failure to investigate the allegations and to control the teacher result in repeated additional assaults upon students.

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit is reported at 856 F.2d 594 (1988). The opinion and order of the United States District Court for the Western District of Pennsylvania is reported at 667 F.Supp. 1088 (1987).

STATEMENT OF CASE

Kathleen Stoneking ("Respondent") commenced this action pursuant to 42 U.S.C. §1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 87-63E, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District.

After some discovery, the individual defendants ("Petitioners") moved for summary judgment on the ground, *inter alia*, of qualified immunity. The district court denied the motion. *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088, 1102 (W.D. Pa. 1987). Petitioners appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which affirmed. *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988).

The facts material to the Third Circuit's decision were derived entirely from the pleadings.[1] Respondent

---

[1] The Court of Appeals correctly noted that there may be instances where discovery is necessary before a motion for summary judgment on qualified immunity can be resolved but, because the Petitioners had elected to "stand on the pleadings," this was not such a case. *Stoneking*, 856 F.2d at 598.

alleged in her complaint that Petitioners had engaged in a long-standing pattern of active concealment and deliberate indifference to instances of sexual misconduct on the part of teachers in the School District, and that this conduct allowed the Bradford Area High School band director, Edward Wright, to molest Respondent frequently from 1980 to 1983, thus violating her constitutionally protected interest in being free from physical abuse and bodily integrity. (Complaint, ¶¶ 13-16, App. 89-90).

Respondent also alleged that Petitioners had actual knowledge during the period she was molested that Wright and other teachers had sexually abused female students, but suppressed this knowledge and discouraged students from pursuing complaints against Wright and other teachers. (Complaint, ¶¶ 11-19, App. 89-90).

Petitioners' statement of Questions Presented at page i of their brief misstates this portion of the record. Petitioners query whether school administrators have a duty to protect students from sexual assaults by a teacher, "where the [school] district has *no knowledge* of the criminal activity or . . . that a particular individual is at risk." However, the record in the Court of Appeals, which Petitioners adopted for purposes of this appeal, assumed that by 1979 Petitioners had actual notice of the sexual misconduct of Wright and other teachers but continued to permit Wright to function as band director and failed to prevent his subsequent assaults upon Respondent and other students.[2] *Stoneking*, 856 F.2d at 598.

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[2] Petitioners' statement on page 6 of their brief that Wright's misconduct was exposed in March of 1986 is accurate to the extent that it reflects when Wright's misconduct was revealed to the public. However, the statement is misleading in that it

In the proceedings below, the Third Circuit held that (1) individuals have a constitutionally protected liberty interest in being free from sexual abuse in school; and (2) where school officials know that a particular teacher presents a "special danger" to a known and identifiable group of students, the officials have a duty to investigate and take reasonable steps to protect the students and to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity. *Stoneking*, 856 F.2d at 603.

The Third Circuit also held that both the right and the duty were "clearly established" in 1979 through 1983, when Respondents were on notice of Wright's abuse of female students. *Id.*

ARGUMENT

A. Summary of Argument.

Petitioners contend that the Third Circuit's opinion below marks a vast and unwarranted expansion of civil liability under section 1983. They argue that school officials have a duty to control an abusive or violent teacher only if they know that the teacher intends to attack a *particular* student. Where, as in the instant case, a particular segment of the student body is at risk, school officials are, according to Petitioners, free to ignore information that the teacher has attacked or abused students in the group at risk in the past and may do so in the future.

The limits of section 1983 liability, however, were not so constrained in 1979 through 1983. The con-

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appears to imply that Petitioners learned of Wright's abuse of students on that date.

stitionally protected right of personal bodily integrity was established no later than 1977, when this court decided *Ingraham v. Wright*, 430 U.S. 651 (1977). The principle that government officials cannot condone or acquiesce in the deprivation of constitionally protected rights by their subordinates has been expressly recognized by every federal court of appeals to address the issue. The duty of school officials to investigate misconduct by teachers and to protect students from known threats of abuse arises from the statutory and common law of Pennsylvania and also from the authority and control school administrators exercise over teachers and students while on school premises or pursuing school related activities.[3]

Notwithstanding Petitioners' assertions to the contrary, this case does not present the same difficult issues addressed in *DeShaney v. Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1218 (1988) and *Estate of Bailey by Oare v. County*

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[3] Petitioners do not challenge the settled proposition that government officials may be held liable under section 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful. See *Estelle v. Gamble*, 429 U.S. 97 (1976). Nor do Petitioners dispute that Respondent has alleged facts, which, if established at trial, demonstrate deliberate indifference to the rights of students. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2nd Cir. 1986) (police officials may be liable under section 1983 where their policy of nonsupervision of police officers amounts to deliberate indifference to the use of excessive force by those officers). Instead, Petitioners argue that, unlike police officers who have a duty to supervise and control their subordinates for the benefit of the public, school officials have no duty to supervise and control teachers for the benefit of students.

of York, 768 F.2d 503 (3rd Cir. 1985). Unlike the defendants in *DeShaney* and *Bailey*, Petitioners not only had a statutory and common law duty to at least investigate and report alleged incidents of abuse of school children, Petitioners also had substantial control and supervisory authority over Wright, the perpetrator of the abuse.

Even Judge Posner, the author of the Seventh Circuit decision in *DeShaney*, agrees that government officials whose positions involve supervisory responsibility have a duty to act where they know or should know of the misconduct of their subordinates. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984).

The holding of the Third Circuit that school officials have a duty not to pursue a policy of concealment and deliberate indifference to sexual misconduct by teachers and to act where they know that a particular teacher is a threat to an identifiable group of students comports with fundamental principles enunciated by this Court and uniformly recognized by the federal courts of appeals. The position urged by the Petitioners, on the other hand, is unsupported by the precedent of any court and does not merit Supreme Court review.

B. School students have a constitutionally protected liberty interest in being free from sexual abuse in school and school officials have a corresponding constitutional duty not to pursue a policy that results in deprivations of that interest.

The liberty interest in being free from physical abuse in school was established no later than 1977, when this Court held in *Ingraham v. Wright* that "corporal punishment in public schools implicates a

constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). This principle has since been uniformly recognized by the federal courts of appeals that have addressed the issue. *See e.g. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

The Third Circuit held that a student's interest in personal bodily integrity encompassed more than freedom from excessive corporal punishment. The Third Circuit and the district court both noted that "common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling." *Stoneking*, 856 F.2d at 599 (*quoting Stoneking*, 667 F.Supp. at 1094).

This conclusion is not genuinely disputed even by Petitioners. Instead, they assert that school administrators did not have a "clearly established" affirmative duty to take steps to protect school children from sexual abuse by a staff member. For this proposition, Petitioners rely principally on *Martinez v. California*, 444 U.S. 277 (1981), where the Court held that members of a parole board were not liable under section 1983 for damages caused when a convict they had paroled murdered the plaintiff's decedent. The Court explained that the parolee was "in no sense an agent of the parole board" and that "the parole board was not aware that [plaintiff's] decedent as distinguished from the public at large, faced any special danger." *Id.* at 285. However, the Court did "not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole," but

did "hold that at least under the particular circumstances of this parole decision, [plaintiff's] decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.*

As Petitioners note, "[s]ince *Martinez*, the courts of appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials." Petitioners' brief at p. 13. However, not all questions in this area of constitutional law are unsettled. The courts of appeals uniformly agree that government officials with supervisory responsibility may not adopt or promote policies that authorize or condone constitutional deprivations by their subordinates. *See e.g. McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984) (police supervisor's negligent selection, supervision or failure to discharge subordinates causally related to their wrongdoing creates liability under section 1983); *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979) (police chiefs have a duty to correct subordinate misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 1831-32 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for breach of their duties to control police officer's known propensity for improper use of force); *Fiacco v. City of Rensselar*, 783 F.2d 319 (2d Cir. 1986) (deliberate indifference to misconduct of subordinates creates liability under section 1983), *cert. denied*, 480 U.S. 922 (1987); *Doe v. New York Dept. of Social Services*, 649 F.2d 134, 144-42 (2d Cir. 1981) (foster care officials' failure to supervise subordinates may demonstrate reckless indifference to the rights of foster children giving rise to section 1983 liability).

This principle is based upon decisions of this Court that predate *Martinez*. In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), this Court explained that "an affirmative link" between the supervisor's own actions and the misconduct of his subordinates is a prerequisite to supervisor liability under section 1983. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that a city is not liable for the acts of a lower echelon employee absent proof of a municipal "policy" that caused the plaintiff's injury.

Both aspects of municipal and supervisor liability are satisfied by the allegations in this case. Petitioners' active concealment and deliberate indifference to sexual misconduct by teachers created a policy that resulted in the deprivation of Respondent's right to be free from sexual abuse. Unlike the governmental action in *Martinez* and *DeShaney*, the actions of Petitioners were not so remote as to create a question of proximate causation. At all relevant times, Petitioners exercised supervisory authority over Wright and authority *in loco parentis* over Respondent.

Petitioners did not merely fail to rescue Respondent from a dangerous third person unrelated to the school district. Petitioners' policy condoning known sexual abuse of students by teachers created the danger to Respondent. The Third Circuit's finding that Petitioners were not entitled to qualified immunity under these circumstances neither expands civil liability under section 1983 as interpreted by this Court in *Martinez* nor conflicts with the decisions of other courts of appeals such as the Seventh Circuit's decision in *DeShaney*.

C. Under the special relationship doctrine, school officials who know that a particular teacher presents a special danger to a known and identifiable group of students have a duty to investigate allegations of abuse and to take reasonable steps to protect the students.

The Third Circuit held that Petitioners had a duty to take affirmative action to investigate and protect students from a teacher's sexual abuse of which they were made aware. Although arising out of similar circumstances, this duty is distinct from Petitioners' duty not to promote policies that deprive students of their right to freedom from sexual abuse. In the present case and in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), the Third Circuit generally embraced the special relationship analysis described in *Jensen v. Conrad*, 747 F.2d 185, 194, n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

In *Jensen*, the estate of two children who suffered fatal beatings at the hands of their guardians brought a section 1983 action against South Carolina state social service agencies and various state employed case workers, alleging that the state, acting through its employees, violated the childrens' fourteenth amendment rights by failing to intervene and provide protection. 747 F.2d at 187. Based upon these facts, the court concluded that at the time of the alleged violation a constitutional right of affirmative protection was not clearly established and, therefore, dismissed the action on the grounds of good faith immunity. *Id.*

However, after reviewing case law establishing that in certain circumstances a special relationship between the government and an individual may give rise to an affirmative duty to act, the court enum-

erated "some of the *factors* that should be included in a 'special relationship' analysis." *Id.* at 194, and n.11 (emphasis supplied). Those factors are:

(1) Whether the *victim or perpretrator* was in legal custody at the time of the incident or, had been in legal custody prior to the incident.

(2) Whether the state has expressly stated its desire to provide affirmative protection to a *particular class* or specific individuals.

(3) Whether the state knew of the claimant's plight.

Id. at 194, n.11.

Petitioners have seized upon these factors as if they were items on a mechanic's maintenance checklist rather than "some of the factors" included in a flexible analysis. They assert that this case requires United States Supreme Court review because the Third Circuit has abolished "one prong of the prior 'special relationship' test." Petitioners' brief at p.16 (emphasis supplied). Relying on this Court's decision in *Martinez*, Petitioners assert that a special relationship can exist only if the "public body has prior knowledge of the *identity* of the victim and the victim's particular plight." *Id.*

In *Martinez*, this court refused to create an unworkable, general right of protection in "the public at large." 444 U.S. at 285. However, the Court did not create a rule of law under which governmental officials must control a subordinate where he threatens a *particular* individual but not where he threatens members of a small group. The Third Circuit correctly

noted that Respondent and the other female band members placed at risk by Petitioners' acquiesence in Wright's misconduct were far from unknown and unidentifiable members of the general populous:

> [Respondent's] relationship vis-a-vis her school's principal, assistant principal, and even school district superintendent, is patently not comparable to an unidentified "member of the general public, living in the free society and having no special custodial or *other* relationship" with state parole officials who released a parolee. *See Fox v. Curtis*, 712 F.2d 84, 88 (4th Cir. 1983). Although she was not in a technical sense in defendants' legal "custody" . . . she was a member of a known and identifiable class of potential victims—female students in general, and female band members in particular.

Stoneking, 856 F.2d at 601.

This Court's holding in *Martinez* provides no support for distinguishing between a known threat to a single individual and a known threat to members of a small group. This distinction is similarly unsupported by the decisions of the federal courts of appeals and was properly rejected by the Third Circuit.

Petitioners also argue that the special relationship analysis should end upon a finding that the victim was not technically in legal custody at the time of the attack. However, no court has held that legal custody is required to create a special relationship, and, in *Jensen*, the Fourth Circuit reaffirmed the principle "that a right to affirmative protection need not be limited by a determination that there was a 'cus-

todial relationship.' " 747 F.2d at 194 (citing *Fox v. Curtis*, 712 F.2d 84 (4th Cir. 1983)).

As it has developed in the courts of appeals, the special relationship issue has never turned on custody alone. Rather, a special relationship may be found where, as in the case at bar, the state has played a significant role in creating a specific danger to an individual. In such cases, the state is enough of an "active tortfeasor" to warrant that it be charged with an affirmative duty of protection. *See Jensen*, 747 F.2d at 194. Petitioner's role in creating an atmosphere that condoned sexual abuse of Respondent and other female band members is in many ways more "active" than where the state takes an individual into custody and places her in a position of danger.

Under Pennsylvania law, Respondent was required to attend school. *See* 24 Pa.Stat.Ann. §13-1327 (Purdon Supp. 1988). "Because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities, at least at the time they are present." *Stoneking*, 856 F.2d 594. Once placed in school, students must necessarily rely on school officials to control abuse or violence after it comes to light or, at least, to adopt policies that do not allow abusive teachers to prey on students with impunity. While Petitioners are correct that they did not "actually abuse [Respondent] or touch [her] in any way," the line between participation and facilitation is not so bold that their acts and omissions escape the coverage of section 1983.[4]

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[4] The Third Circuit also concluded that the state has expressly stated its desire to provide affirmative protection to students.

In addition to the Fourth Circuit in *Jensen*, the Eleventh Circuit also has expressly recognized the special relationship doctrine. *See Taylor v. Ledbetter*, 818 F.2d 791, 797-98 (11th Cir. 1987). In *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), the Third Circuit held that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from abuse. In *DeShaney*, although the Seventh Circuit refused to adopt the special relationship doctrine as set forth in *Estate of Bailey*, it was careful to distinguish the facts before it and those of *Estate of Bailey* from cases where the state has placed an individual "in a position of danger . . ." 812 F.2d at 303-304. In the latter cases, the state, the court explained, "cannot shrug off all responsibility when the danger materializes and injury results." *Id.* at 304.

The Seventh Circuit had previously employed this same reasoning in *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where it found a due process violation based upon the refusal of police officers to lend aid to children endangered when the officers arrested the

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Stoneking, 856 F.2d at 601-603. In so finding, the court relied on a number of authorities, including the Child Protective Services Law, 11 Pa. Stat. Ann. Section 202 *et seq.*, the statute permitting termination of a teacher's contract for, *inter alia*, "immorality," 24 Pa. Stat. Ann. Section 11-1122 (Purdon 1962); as well as the *in loco parentis* statute, 24 Pa. Stat. Ann. Section 13-1317 (Purdon Supp. 1988). In addition to statutory law, the court also noted that the "duty . . . to protect students from the tortious or criminal conduct of teachers has long been established in the common law." *Id.* at 602 (citing cases and Restatement (Second) of Torts, Section 320 (1965)).

father of the children and left them in an abandoned car on the side of the road. The court stated:

> It is clearly established that although officials may not be held liable for simple negligence, they may be held liable for "gross negligence" or "reckless disregard" for the safety of others. In the case before us the police could not avoid knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic. This indifference in the face of known dangers certainly must constitute gross negligence.

592 F.2d at 385 (footnotes omitted).

Thus, whether grounded on the "special relationship" doctrine adopted by the Third, Fourth, and Eleventh Circuits or the "reckless disregard" of a state created danger concept followed by the Seventh Circuit, the judgment of the Third Circuit below does not depart from clearly established principles of constitutional law.

Nor does the judgment of the court conflict with the decision of the Pennsylvania Commonwealth Court in *Scott v. Willis*, ___Pa. Cmwlth. ___, 543 A.2d 165 (1988).[5] *Scott* also involved a section 1983 claim against school officials arising out of the sexual assault of students by a teacher. However, in sharp contrast to the case at bar, the plaintiffs in *Scott*

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[5] The Pennsylvania Commonwealth Court acts as an intermediate level appellate court with jurisdiction of appeals from final orders of the courts of common pleas in cases involving, *inter alia*, local governmental bodies. *See* 42 Pa.Cons.Stat.Ann. §762 (Purdon Supp. 1988).

"totally failed to plead any policy or custom of the School District which could establish a causal nexus between the School District and the tragic assault upon" the students. 543 A.2d at 170. The plaintiffs also failed to plead "any facts to suggest that any of the [defendants] had notice of [the teacher's] dangerous proclivities."[6] *Id.* at 171.

The absence of notice to the school officials and of a policy or custom condoning the abuse clearly distinguish *Scott* from the instant case. Certainly, *Scott* does not stand for the proposition that school officials can tolerate the abuse of students by teachers. It, therefore, is not contrary to the decision of the Third Circuit in the case at bar.

D. The Third Circuit correctly applied the *Harlow v. Fitzgerald* standard for determining whether government officials are entitled to qualified immunity.

Government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, ___U.S. ___, 107 S.Ct. 3034, 3039 (1987). Consistent with this principle, the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply, well developed legal principles." *Stoneking*, 856

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[6] The Pennsylvania Rules of Civil Procedure require that a claimant plead the material, or ultimate, facts supporting each element of her cause of action. *See* Pa.R.Civ.P. 1019(a).

F.2d at 599 (*quoting People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144 (3d Cir. 1984)). *See also Prisco v. United States Dept. of Justice*, 851 F.2d 93, 96-97 (3d Cir. 1988); *Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987).

Petitioners complain that the Third Circuit misapplied this standard in the present case because a general constitutional duty to protect students was not clearly established in 1979. However, Petitioners misstate the relevant period of inquiry and the underlying constitutional right involved in this case. While 1979 is significant because it marks the latest date on which Petitioners were on notice of Wright's misconduct and of his potential threat to students, the conduct of Petitioners challenged by Respondent involves much more than Petitioners' initial failure to respond to complaints of abuse.

The record before the Third Circuit was that Petitioners failed to report the various incidents of suspected sexual abuse of female band members by Wright; failed to adopt an effective policy or policies to prevent the sexual abuse of female students and to promptly report complaints of such abuse to appropriate authorities; failed to properly and vigorously investigate reports of sexual abuse by Wright of female band members; concealed from parents of female band members and public officials the various complaints and accusations that had been made against Wright since 1979; continued to permit Wright to function as band director despite actual notice that he presented a significant threat; and encouraged and perpetuated the custom and course of conduct at the high school whereby allegations of sexual abuse or mistreatment by Wright and other teachers were not

investigated and reported. *Stoneking*, 856 F.2d 596. Respondent alleges that these acts and omissions were pursuant to a policy of the School District that continued at least until 1983, when Respondent graduated from high school.

Petitioners' statement of the rights at issue in this case also misses the mark. The Third Circuit did not address whether school officials have a duty to protect students from unknown threats. Resolution of that broad issue was unnecessary. Rather, the court held that by 1979, two specific principles were clearly established: (1) individuals have a constitutionally protected liberty interest in being free from sexual abuse in school; and (2) where school officials know that a particular teacher presents a "special danger" to a known and identifiable group of students, the officials have a duty to investigate and take reasonable steps to protect the students and to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity. *Stoneking*, 856 F.2d at 603.

As discussed above,[7] the first principle was clearly established no later than 1977, when this Court decided *Ingraham v. Wright*. The affirmative duty aspect of the second principle was clearly established in cases such as *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) and *Doe v. New York Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981). Finally, the duty of government officials with supervisory responsibility not to adopt or promote policies that authorize or condone misconduct by their subordinates was clearly established in cases such as *McClelland v. Facteau*,

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[7] See pages 5-6, supra.

610 F.2d 693 (10th Cir. 1979); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) and *Doe v. New York Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981).

In *Anderson v. Creighton*, ___U.S. at ___ , 107 S.Ct. at 3039, this Court emphasized that it is not the case that "an official action is protected by official immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." Although they arose in different factual settings, the duty to act cases and supervisory responsibility cases cited above established the rights and principles necessary to place a reasonable school official on notice that his reckless disregard and condonation of the abuse of students by a teacher were unlawful. Petitioners required neither clairvoyance nor the advice of a constitutional scholar to apprise them in 1979 through 1983 that their conduct was unlawful.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 88-802

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATUTES

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I. INTRODUCTION

The Respondent, Kathleen Stoneking (hereinafter "Stoneking") has included in her Brief in Opposition to Petition for Writ of Certiorari a number of misstatements of fact and law that distort Petitioners' arguments. Petitioners take this opportunity to redirect this Court's attention to the real issue presented in this case: whether Petitioners Smith, Miller and Shuey are immune from suit under the facts alleged by Stoneking in this case.

II. PETITIONERS ARE ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY

In their Petition for Writ of Certiorari, Petitioners have argued that they are entitled to assert the defense of qualified immunity, because no clearly established law existed in 1979 upon which liability can be based. Judge Stapleton, in his dissent to the Third Circuit panel decision, correctly noted that no such clearly established law existed in 1979, saying

> neither this Court [the Third Circuit] nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.

App., p. 26.

Stoneking, however, distorts this argument, and claims that "Petitioners argue that, unlike police officers

who have a duty to supervise and control their subordinates for the benefit of the public, school officials have no duty to supervise and control teachers for the benefit of students." Respondent's Brief, p. 4, n. 3. This is a gross misstatement of Petitioners' position. Petitioners recognize that, as school administrators, they have a contractual and statutory duty to supervise their subordinates. However, even if this duty is now held to rise to constitutional dimensions, this is not the duty which Stoneking would place upon Petitioners, nor was any such duty established in 1979. As Judge Stapleton further noted in his dissent,

> It is one thing to hold that a public school administrator has a duty to protect a particular student within his or her jurisdiction whom he or she knows to be in particular jeopardy. It is another thing to hold that there is an affirmative duty to protect an individual in a position like that of Stoneking, whom the administrator had no reason to believe was any more at risk from sexually aggressive teachers than her female classmates. The Court [Third Circuit] points to nothing that should have made the leap between these two propositions apparent to the school administrators. Indeed, the authorities relied upon by the Court suggest that there is no duty to protect in the absence of notice that a particular individual is in peril.

App., p. 28-29.

The disparity between these two propositions noted by Judge Stapleton lies at the very heart of Petitioners' contention that they are entitled to the defense of qualified immunity. Petitioners cannot be held accountable for not anticipating in 1979 that such a leap would be made by the Third Circuit in 1988; accordingly, they are entitled to the defense of qualified immunity.

Further, both the Court below and Stoneking continue to fail to appreciate that the Pennsylvania Commonwealth Court's ruling in *Scott vs Willis*, ____ Pa.Cmwlth. _____, 543 A.2d 165 (1988), is of special significance to this case. In *Scott*, the appellate court ruled, as a matter of law, that a school district and its administrators would not be liable for the sexual abuse of students, "[i]n the absence of an affirmative promise to protect a particular individual who eventually suffers the foreseeable injury . . ." *Id.* at 171. Petitioners agree with Stoneking's statement that *Scott* does not stand for the proposition that school officials can tolerate the abuse of students by teachers; Petitioners have never claimed otherwise. However, the ruling in *Scott* contradicts Stoneking's claim that a school district or its administrators are liable for injuries to a student in the absence of actual knowledge of criminal activity occurring or knowledge that any particular student is at risk.

This holding in *Scott vs Willis* is at odds with the Third Circuit decision, and Stoneking's claim, in the present

case. This disparity demonstrates that the law regarding the right and corresponding duty owed by Petitioners, now claimed by Stoneking, was not clearly established in 1979, and indeed has not been clearly established to the present time. Certainly, if both state and federal appellate courts cannot agree on whether any constitutional duty exists, the lay public school administrators could not be expected to make any such determination. Petitioners are entitled to assert the defense of qualified immunity, and be dismissed as defendants in this case.

III. RESPONDENT ERRS IN RELYING ON *INGRAHAM VS WRIGHT* FOR THE PROPOSITION THAT PETITIONERS VIOLATED A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT.

Stoneking, on page 5 of her brief, argues that this Court's decision in *Ingraham vs Wright*, 430 U.S. 651 (1977), establishes that she possesses a liberty interest in her personal bodily integrity, allowing her to be free from sexual abuse. Further, as a necessary corollary, she asserts that there is, in fact, a clearly established affirmative duty of school administrators to protect unidentified school students from sexual abuse by a staff member. However, *Ingraham* does not stand for this corollary proposition.

Instead, this Court held in *Ingraham* that procedural due process does not require that a hearing be held prior to the of corporal punishment of a student, because the

existence of common law remedies for any unwarranted or excessive punishment satisfies 14th amendment due process concerns. *Id.*, p. 684. Thus, while this Court decided the question of whether or not a student's *procedural* due process rights may be violated in certain corporal punishment situations, this Court did not address the issue of whether a student's right to be free from invasions of bodily integrity was a right protected by the *substantive* component of the due process clause.

In the instant case, however, Stoneking is claiming that her *substantive* constitutional rights were violated. But the application of this Court's decision in *Ingraham* to the present case reveals that Petitioners have not done anything to deprive Stoneking of her claimed liberty interest without due process of law. In fact, nothing that any of the Petitioners has done or failed to do has deprived her of seeking a traditional remedy in state court under common law tort principles. Stoneking remains free to pursue in state court her alleged assailant, Edward Wright, for his intentional tort of battery, if it be such. Because she has access to this remedy, no due process violation can be alleged;[1] this is all that *Ingraham* requires.

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[1]Section 1983 was not designed to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states . . ." *Daniels vs Williams*, 474 U.S. 327 (1986), quoting *Paul vs Davis*, 424 U.S. 693, 701 (1976). While Petitioners are immune from suit under state law for state tort claims, this Court has already determined that the limited shield of sovereign immunity does not deprive a claimant of due process rights. For example, in *Martinez vs California*, 444 U.S. 277 (1980), this Court held that a claim against the State of California,

Moreover, *Ingraham* has no factual correspondence to Stoneking's claim. The rule established in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), requires some, but not precise, factual correspondence between applicable legal precedence and the case at issue.[2] *Ingraham*, however, discusses only procedural due process rights of students, and has no factual or legal relevance to whether or not the substantive right by Stoneking, and the corresponding duty which Stoneking would now place upon Smith, Miller and Shuey, were clearly established in 1979.

The distinction Smith, Miller and Shuey draw between the corporal punishment cases such as *Ingraham* and this case is not merely semantic. Rather, an examination of *Hall vs Tawney*, 621 F.2d 607 (4th Cir. 1980), relied

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barred by the doctrine of sovereign immunity, did not violate the due process clause of the Fourteenth Amendment. The following term, in *Parratt vs Taylor*, 451 U.S. 527 (1981), this Court held that the State of Nebraska tort claims procedure complied with due process even though it provided less relief than traditional tort remedies.

[2] Likewise, the police misconduct cases cited by Stoneking in her brief are inapplicable to any legal issues presented in this appeal. The police misconduct case cited on Page 7 of Respondent's Brief, as well as the cases cited on Page 4, n. 3, assume the existence of actual state custody or police detention, factors which are admittedly absent from this case. Because these factors go to the very heart of whether or not a special relationship exists, these critical factual differences between the case at bar and the cases cited by Stoneking demonstrate the lack of a "special relationship" sufficient to impose liability on Smith, Miller and Shuey.

upon by both Stoneking (page 6 of her Brief) and the court below, reveals the critical distinction between the case at bar and a case of allegedly improper corporal punishment. In *Hall*, the Fourth Circuit found that recognizing a substantive due process right to be free from "*state intrusions* into realms of personal privacy and bodily security" was appropriate "as a last line of defense against . . . literally outrageous abuses of official power . . ." *Id.* at 613 [emphasis supplied].

In *Hall*, the Court was faced with allegations that a child had been subjected to paddling despite her parents' prior instructions to the school that they did not wish school officials to inflict corporal punishment on their daughter. What was at issue, then, was a *conscious decision* by school officials to inflict corporal punishment on a student. The persons who made that decision were the defendants who were alleged to have abused their "official power" and who actually visited the "intrusion into . . . personal privacy and bodily security . . ."

In the case at bar, however, far from a "literally outrageous abuse of official power," Stoneking accuses Smith, Miller and Shuey of not exercising their power sufficiently to prevent harm from being visited upon her from another source. They are not accused of any sexual contact with Stoneking; thus they are not the actors who

inflicted the actual harm on her.[3] The allegations of her Complaint are thus of an entirely different character than the authority upon which she primarily relies.

The extension of liability for violations of a person's civil rights to persons other than those who actually inflict the harm not only was not clearly established in 1979, it has not even been established to this date. There can be no doubt, therefore, that Smith, Miller and Shuey are immune from this suit.

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[3] There is no allegation that the sexual contact with Edward Wright was sanctioned, approved or ratified by Smith, Miller and Shuey. Since it was that contact which constitutes the "intrusion," in no way has there been a "state intrusion" as that term is used by the Court in *Hall vs Tawney*.

IV. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issued from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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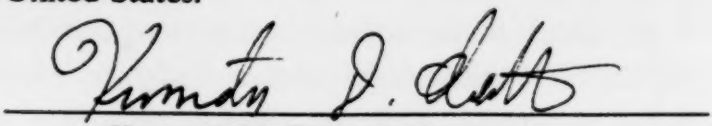
V. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



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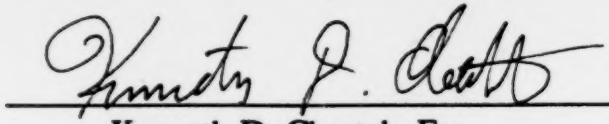
VI. PROOF OF SERVICE

I hereby certify that three copies of the within Petitioners' Reply Brief in Support of Petition for Writ of Certiorari were served on Deborah W. Babcox, Esq., 222 West Washington Street, Bradford, PA 16701 and Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 11 day of January, 1989.



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